THE STUDENT, THE UNIVERSITY AND THE FIRST AMENDMENT

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PREFACE

We have largely lost sight of academic freedom for the student and it is high time that it be restored to our academic pattern and recognized as having constitutional underpinnings in many of its facets. The reason for urging this restoration is practical, not sentimental. Almost all the pressures on the youth in our society are for conservatism and conformity. The pressures of the home, community, television and other media, and from most of the paraphernalia of life that surrounds today's youth all create a climate of opinion which makes for conformity and conservatism.

One of the functions of the university is to provide some counterbalance to this tradition of conservatism and habit of conformity so natural to youth. Probably nowhere else in the world do young persons talk so much about their liberty and do so little with it when they have it as here in the United States. They do not know how to act when they are given independence because they have not been trained to use it. Our colleges and universities are especially remiss at providing effective training in the nature, observance, or use of freedom.† One may well ask when our young people are supposed to learn how to be independent, how to think for themselves, how to assume the duties and obligations of citizenship, and how to manage their own affairs if they do not learn it in this crucial period of their lives. How will today's youth grow up intellectually if they are not allowed to do so in their college years?

The reason for all this is as elementary as it is obvious. The reason for freedom for the student, for freedom from incursions on first amendment rights and guarantees, is the same reason as that for freedom for the scientist or for the judge; namely, that it is the price of survival. It is a price we pay for avoiding error and seeking truth; it is the price we pay for pushing outward the boundaries of knowledge and for training a new generation in independence of thought and character. On no other terms can we get first-rate citizens; and on no other terms can we have any expectation of avoiding error and discovering truth, which is a function of all kinds of freedom: of speech, of the press, and of association.

I. BACKGROUND OF UNIVERSITY/STUDENT RELATIONSHIP

There looms large on the horizon of most state universities a necessary reexamination of the important question which, posed in general terms,

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† Throughout this article the terms "college," "university," and "institution" are used interchangeably to denote an institution of higher education.

can be stated thusly: Are the constitutional principles of the first and fourteenth amendments to the Constitution of the United States applicable to the relationships between a university and its students? Until recently, the courts have held, with few exceptions, that although there exists the requisite jurisdiction to hear student cases, the area is one to be entered by the courts only with the greatest restraint and caution.

The judicial reliance on a self-perpetuating *stare decisis* approach to the problem of judicially reviewing a university's actions in student disciplinary matters has negated any significant attempt to examine the problem comprehensively. It is only of relatively recent date that courts have recognized the viability and impact of judicial review in student claims of constitutional infringement relating to university expulsion, suspension, or other disciplinary action.[1] Furthermore, the Supreme Court has only recently spoken directly to issues raised in the attempt to apply constitutional principles to a student's status within the educational and institutional framework.[2]

This paper will attempt to treat the exercise by students of first amendment free speech rights and the limit of authority exercised by school administrations *vis-a-vis* that exercise. The primary issue to consider in this regard is: In adopting appropriate measures to maintain decorum among students and engender the academic atmosphere, what are the limits beyond which institutional authorities cannot go in deterring actions which would clearly be protected by the first amendment against interference by other state or state action machinery? Stated differently, when does the establishment of academic freedom limitations become a matter involving first amendment infringement?

The Privilege/Right Rationale

An often used justification and defense to support summary action taken by a university as a proper exercise of power has been the theory that attendance is a mere privilege and not a right.[3] When an institution alleges that, by his attendance, a student has effectively waived his right to be free from the imposition of sanctions without procedural due process, it is doing no less than saying that a pre-condition for the exercise of the privilege of attending school is the submission to an unconstitutional condition.[4] The logic in such an approach is immediately persuasive. Indeed,

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[1] Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), *reversing* 186 F. Supp. 945 (M.D. Ala. 1960), *cert. denied*, 368 U.S. 930 (1961); *accord*, Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961).

[2] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[3] Of course a student who is scholastically ineligible for admission into a given university does not have a constitutional right to attend that institution. *Wright v. Texas Southern University*, 392 F.2d 728 (5th Cir. 1968).

[4] Goldberg v. Regents of University of California, 248 Cal. App.2d 867, 57 Cal. Rptr. 463

this reasoning served for a long time as the determinative tool of legal analysis in cases concerning governmental/individual relationships in which the individual received something of value. It was long assumed that if the grant of a benefit to a party rested within the discretion of the state then, *ipso facto*, the granting authority could attach a burden or condition to the grant. ". . . [T]he greater power contains the lesser."[5] For example, if public employment is only a privilege extended by the governmental authority, a municipal employee should not be heard in alleging impairment of constitutional freedoms through an ordinance prohibiting solicitation of political contributions. The employee ". . . may have a constitutional right to [engage in] politics, but he has no constitutional right to be [an employee]."[6] Placed in the context of this paper, one may paraphrase the above by saying that one has a constitutionally underscored right to be a conscientious objector, but not a correlative right to refuse to engage in military training as a required course of a university.[7]

The philosophy which is the credo of the right/privilege theory was best given articulation in the early case of *Anthony v. Syracuse*,[8] in which a New York court said: "Attendance at the university is a privilege and not a right . . . the university reserves the right and the student concedes to the university the right to require the withdrawal of any student at any time for any reason . . . and no reason for requiring such withdrawal need be given."[9]

The Contract Rationale

Allied to the privilege/right theory, there remains another principle of administrative power allegedly justified by the idea of waiver. One author erroneously proposes that the so-called "contract theory" is today the acknowledged guide to which courts look when viewing the university/student imbroglio.[10]

The use of the contract theory as a justification of the university's failure to provide for disciplinary procedures meeting the minimal elements of

(1967) accepted the rationale that students, whose education is publicly financed, attend the university on the basis of a privilege or benefit conferred upon them. From this the court perceived the test of constitutional infringement to be:

> whether conditions annexed to the benefit reasonably tend to further the purposes sought by conferment of that benefit and whether the utility of imposing the conditions manifestly outweighs any resulting impairment of constitutional rights. 248 Cal. App. at 877.

[5] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

[6] McAuliffe v. Mayor & Board of Aldermen, 155 Mass. 216, 29 N.E. 517 (1892).

[7] Hamilton v. Regents of University of California, 293 U.S. 245 (1934).

[8] 244 App. Div. 487, 231 N.Y. Supp. 435 (1928).

[9] *Id.* at 489; *See also*, 14 C.J.S. *Colleges and Universities* § 26 (1939).

[10] Note, *The College Student and Due Process in Disciplinary Proceedings*, 1962 ILL. L.F. 438. *But see*, Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968) which rejects the notion of a contractual relationship existing between the student and the university.

fairness is a tortured lesson in logic. The rationale of the contract theory is that a student, by entering the university, enters into a contract, the terms of which are expressed in the university's charter and the promulgated regulations governing student conduct.

> The relationship existing between the university and the student is contractual . . . [T]here is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college. . . .[11]

This "contract" of student status and its implicit waiver is at best an exercise in legal fictions. With whom does the student make this contract? Most courts have said the contract was made with the university.[12] But there is no gainsaying that a prospective student and an institution do not meet in the marketplace at arm's length like businessmen and negotiate the terms of the ensuing student/university relationship. In reality, the prospective student has no choice as to terms of attendance but is compelled to adhere to the inflexible ones presented. Even then, the university is not bound, for it retains the unlimited power to amend any term at any time.[13]

The contract theory is as far removed from the mainstream of contract jurisprudence as would be a similar theory applied to marriage or a purchase on the stock exchange. Further, the theory fails the most important test served by the perpetuation of legal fictions. It is an ill-fitting category which speaks only in conclusionary terms. It does not describe a relationship, but like the privilege theory discussed above, it serves only as a *ratio decidendi* to characterize the result. In this respect it does not aid a court in arriving at a sound result. Thus, I fear, the contract theory is but a gossamer web self-spun without a scintilla of support to which one can point.

Some courts have implied that the "contract" is made with the other students.[14] But how can this be? It seems absurd to suggest that each student contracts with all other students at a university in a mutual waiver of the right of freedom from arbitrary action which would otherwise be proscribed by constitutional principles.

The Myth of In Loco Parentis

The classical American college was a place of serene social relationships and scholarly detachment. The students of this classical college had their

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[11] Goldstein v. New York University, 76 App. Div. 80, 82, 78 N.Y. Supp. 739, 740 (1902).

[12] 15 Am. Jur. 2d, *Colleges and Universities* § 25 (1964); *See also*, Koblitz v. Western Reserve University, 21 Ohio C.C.R. 144 (1901).

[13] Dehaan v. Brandeis University, 150 F. Supp. 636 (D. Mass. 1957); Sampson v. Trustees of Columbia University, 167 N.Y.S. 202, 203 (1917); *See also*, Anthony v. Syracuse University, *supra* note 8; People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 14 N.Y.S. 490, *aff'd*, 128 N.Y. 621 (1891).

[14] *See e.g.*, Stetson University v. Hunt, 88 Fla. 510, 102 So. 637 (1925).

place in a well-ordered hierarchy. In the bucolic setting of their splendid isolation, the student indulged in the costly luxury and privilege of the liberal arts and the administrator taught what he believed the students needed to learn.

The student in this setting did not go to college; he was sent. His relationship to the college was indeed a contractual one in that he was the beneficiary of a contract between his parents and the university, which no doubt gave rise to the discredited theory discussed above. The student's parents became obligated to the university in return for the latter's promise to provide a benefit to the student by way of educating him. Viewed in that context, the beneficiary/student, the object of the charity, had no voice over any incidents or terms of the contract. He was in no position to require anything or enforce any obligation against the college.

This classical image envisions an age in which parents took an assertive and autocratic stance towards their children. Youth was recognized as an incapacity within the cultural mode then extant. It was that very cultural climate which underscored and reinforced the traditional student's sense of his servile, child-like status in his relationship to his college.

Within such a referential frame, it is not difficult to understand how the doctrine of *in loco parentis* came to grow and flourish in the United States. The parent having given over his child to the college administrator for the purpose of his education, these authorities came to act in lieu of parents, empowered by law,[15] custom, and usage to direct and control student conduct to the same extent as a parent. It is thus easily understood how this concept became embodied as an integral part of the administrator's view of his relationship to the student. One highly regarded historian has characterized the historical basis of *in loco parentis* thusly:

> [It] was transferred from Cambridge to America. . . . College students were, for the most part, very young. A great many boys went up to college in the Colonial era at the age of [thirteen]. They were . . . what our high school youngsters are now. They did need taking care of, and the tutors were *in loco parentis*. This habit was reinforced with the coming of education for girls and of co-education.[16]

The widespread acceptance of the *in loco parentis* theory as a legal doctrine justifying the abstention of courts in student/university conflicts persisted for a long time and is slow-dying. The principle was generally stated in terms which said, "College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of pupils. . . . [The] school, its officers and students are a legal entity, as much as any family, and like a father may direct his children, those [school administra-

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[15] *See e.g.*, Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

[16] Letter from Professor Henry Commager to Professor Van Alstyne in, Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368, 377-78 (1963).

tors] are well within their rights and powers when they direct their students. . . ."[17]

Such rationale must fall of its own weight if the logical conclusion of such a statement is read carefully. The actual power of the family unit is framed within an idea of natural affection and restraint impelled by family life. Moreover, the traditional prerogative of parents to deal summarily with their own children is partly justified by the constant and recurring contacts within the family circle. It would be ludicrous indeed to suggest that every disciplinary event within the household be carried out using formalized procedures. It would be difficult at best to persuasively suggest that the interests of a university in the conduct of its students is as constant, detailed, or intimate as in the family circle. Surely the law will not permit parents to "suspend" or "expel" a child from the home. To attempt to "throw out" a child would subject the parent to criminal prosecution. If the university wishes to justify its unilateral action under the doctrine of *in loco parentis*, it should be prepared to accept the proscriptions of the legal limits of due process in so doing.

The rationale applied in many instances for the institutional use of the doctrine rests on the implied supposition that students are without legal capacity. Viewed statistically, this assertion can simply not be seriously advanced. Today's university students have a median age hovering around twenty years, and the number of students who have attained their majority exceeds one million.[18] The university students of today comprise a total of almost 25% of the nation's population between 18-24 years.[19] It is also significant to note that graduate and professional students are ordinarily accorded no more due process in disciplinary matters than their undergraduate colleagues, and the average age of the former group is above 22 years.[20]

The common assertion that the institution's extraordinary power is one entrusted to it by parents is indefensible. Certainly it is difficult to imagine that parents either demand or could reasonably expect that large universities with their student bodies of ten or twenty thousand or more, the majority of whom live off campus, should stand in the place of the parent and closely supervise their "children." Even were this fallacy correct and the notion of *in loco parentis* made to rest on the presumed desire of the parents and a literal delegation of their authority, it is safe conjecture that the

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[17] Gott v. Berea College, *supra* note 15; *See generally*, Stetson v. Hunt, *supra* note 14; Anthony v. Syracuse, *supra* note 8; State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932); Tanton v. McKinney, 226 Mich. 245, 197 N.W. 510 (1924); Woods v. Simpson, 146 Md. 547, 126 Atl. 882 (1924); Vermilion v. State *ex rel.* Englehardt, 78 Neb. 107, 110 N.W. 736 (1907).

[18] Based on U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports, July 24, 1961.

[19] *Id.*

[20] *Id.*

same parents would not want their children expelled or suspended without a full measure of due process in the decision making routine of the university. Such a method of application has too much of the flavor of throwing out the baby with the bath.

The logical extension of the doctrine leads to the inescapable conclusion that while minor students are subject to the university's exercise of power under the doctrine, the adult student would be beyond reach due to his age. At no university is such an anomalous situation known to exist. To use the doctrine as a justification to preclude an adherence to procedural due process as a constitutional prerequisite to sanctioning, is tantamount to asserting that it can apply in other areas of a student's citizenship. Take as an example a student's protected right to be free from an unreasonable search. If *in loco parentis* can be applied to minor students living on the campus proper, the logical extension of the doctrine makes it likewise applicable to those minor students living in the off-campus community as private residents. This would be so because the power in the university is bottomed on status *vis-a-vis* location. It is specious to claim that a university administrator is legally empowered to knock at a student's off-campus home and demand to conduct a search *in loco parentis*. Even the most frequently cited case to support this doctrine renders it a nullity in the posed situation.[21]

Further, it should be recognized that today's university students come from social classes and national and racial backgrounds never before present on campuses in such numbers. These students are not only bright and mature, but have become newly aware of their political power. The expression and imposition of such a false and potentially arbitrary doctrine as *in loco parentis* serves only to further alienate these students from our traditional values. The character of the university student body has been and is currently undergoing a radical change which acts to strain even more the traditional organization of university authority where the doctrine is used as university policy.

Today's student is not only older than the student at the time of the doctrine's adoption, but he has experienced more of life. He comes from family backgrounds which have been largely caught up in the economic and social struggles of today's world. The style of family life is vastly different from that of the classical days. He has been brought up in a family circle where life is more open and honest; he has become more aware of what life is really all about. He has had the advantage of better primary and secondary education. And finally, he is the product of the communications revolution; he is a child of television and the film industries which have brought the whole spectrum of human life and emotions to him. He has been a vicarious witness to the whole play of political passions, love, ha-

[21] Stetson University v. Hunt *supra* note 14.

tred, war, bloodshed, discrimination, and deprivation. The students of today have received the media's message and they exhibit its influence in their maturity of bearing and purpose.

In light of the above discussion, it is clear that, legally or otherwise, the doctrine of *in loco parentis* is indefensible as a rationale for a university's failure to provide a semblance of due process based on rudimentary fairness in its disciplinary procedures; and that the doctrine cannot withstand a close and analytical scrutiny.[22] The doctrine of *in loco parentis* is based on reasoning that is as much out of place today as a belief that the earth is flat.

Granting then that some mode of procedural due process is required of a university in student sanctioning methods, what of the activities which most often form the basis for the attempted sanctions? In today's university setting the occasion for the attempted sanctioning of students arises most often out of events in which the interest of the student and the university clash. It is the student's action which takes on the hue of a colorable constitutional exercise that will be examined below. The black and white of the earlier doctrines used to justify university action must, in today's constitutional jurisprudence, be toned with shades of grey and the heretofore presumed clear demarcation lines have shadows cast over them.

II. Current Assessment Of The Scope of Protected Student Activities and Interests

Problems of Political Membership and Activity

As a preliminary question, one should examine the power of the university in structuring its student populace. May a university establish restraints which, through their operation, will determine the make-up of its student body?

Any educational institution imposes elaborate restraints upon students: they must take certain courses in required sequence; they must maintain a specified grade average; they must not cheat in the performance of their academic tasks; they must return library books on time and not deface them; they must maintain order in the residence halls; they may be required to observe curfews; they may be subject to dress regulations, and subject to smoking and drinking restrictions. None of these can be said to *per se* violate a student's academic freedom since they are largely incidental to learning activity. It cannot be said that any of these rules *per se* serve to inhibit academic freedom. The thrust of these rules goes primarily to the reasonable time, place, and manner of exercising private rights compatibly

[22] *See* Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968) which rejects the doctrine that a college stands *in loco parentis* to its students. Rather, "the relationship grows out of the peculiar and sometimes competing interests of the college and student." 284 F. Supp. at 729.

with the university's business. If one can accept the reasonableness of these rules, it can be said that their neutral enforcement is unobjectionable. But, this type of normative operational university rule has at the maximum only an incidental impact on any constitutional interests of a student. The attendance or non-attendance of a student based upon such rules seems to this writer to raise no problems of constitutional magnitude.

Conversely, one can envision a university regulation worded in self-protective terms purporting to limit enrollment to those persons who pose no subversive threat to the nation, state, or institution. Can a university today restrain attendance due to the political party membership or political activities of a student?

It should not be open to doubt that a university regulation purporting to proscribe student membership in the Republican or Democratic parties would be short-lived. A similar result would obviously occur if a total prohibition on student political activity was sought to be mandated. The question becomes superficially less clear when the regulation is phrased in such terms as: admission or re-admission shall be denied to any applicant who exhibits subversive tendencies or who advocates, teaches, etc., the doctrine that the United Staes government or the government of this state, etc., should be overthrown by force or violence or any unlawful means. By seeking to so structure its student body to preclude such persons who may come within the criteria of this fictional standard, is the university acting within acceptable constitutional principles? While this question has never been directly answered, it has been analogously raised in other contexts. These analogous situations have generally been concerned with teachers' membership but the analysis is easily transposable.

That a state has a legitimate interest in protecting its educational system from subversion is well recognized.[23] However, the state has generally been denied the *carte blanche* which such a recognition could be taken to imply. This denial has not been based on the purpose detailed above, but rather on the constitutional magnitude of the restrictions which such a regulation normally engenders. The Supreme Court has recognized the stifling effect that is caused by a sweeping proscription against the presence of unpopular or even subversive political viewpoints in the classroom. "The classroom is peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through a wide exposure to [a] robust exchange of ideas."[24] Implicit in the theory that a university is the marketplace of ideas, is the idea that to circumscribe the limits of inquiry, study, and evaluation would be to curtail society's opportunity to gain new maturity and understanding. The ultimate effect of such a limitation would be to place our intellectual leaders, extant and potential, in an academic strait jacket which

[23] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[24] *Id.* at 603.

could only act to imperil our future as a nation.[25] In the cases dealing with teachers' membership in organizations sought to be castigated as subversive,[26] the attempted dismissal was based on the assumption that the teacher abused his position of trust by acting to bring about an avoidable evil. In viewing these cases, the Supreme Court sought to draw clearly the distinction between advocacy that combined doctrinal justification of future violent action *with* exhortation to immediate action, *vis-a-vis* the mere exercise of the former.[27] It is only the latter element which makes operative the acceptance of means by the state calculated to protect itself; in this case its educational system.

It would seem clear that the attempt by a university to exclude a student on the basis of the purported regulation would contravene the limits of first amendment rights of association. The rationale that guilt by association has no place in our society[28] is surely as applicable to students within the university community as it is to teachers. A regulation which seeks to, in effect, sanction a student through denial of enrollment based on political beliefs or associations is an unnecessary infringement on first amendment and academic freedoms unless it can be clearly shown that the student has the "specific intent to further the illegal aims of [his] organization."[29]

Recognition of the constitutional support of the "right of association" is of relatively recent date. This came about in the 1958 decision of *NAACP v. Alabama ex rel. Patterson*.[30] In that case the State of Alabama sought to compel production of NAACP records. In writing for the court, Mr. Justice Harlan initially treated freedom of association as a derivative of the first amendment rights of speech and assembly.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.[31]

In the remainder of his opinion, however, Mr. Justice Harlan elevated freedom of association to an independent right, possessing an equal status with the other rights enumerated in the first amendment. He repeatedly used

[25] *See*, Sweezy v. New Hampshire, 354 U.S. 234, *esp.* at 250 (1957).

[26] Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents *supra* note 23; Sweezy v. New Hampshire, *supra* note 25. *See also*, Baggett v. Bullitt, 377 U.S. 360 (1964).

[27] Noto v. United States, 367 U.S. 290 (1961).

[28] Elfbrandt v. Russell, 384 U.S. 11 (1966).

[29] Schneiderman v. United States, 320 U.S. 118, 136 (1943).

[30] 357 U.S. 449 (1958).

[31] *Id.* at 460.

the phrase "freedom of association" by itself, and at one point carefully distinguished it by referring to "these indespensable liberties, whether of speech, press *or* association."[32] Thus, by the end of his opinion, it is clear that the Court has established the "constitutional right of association"[33] which subjects state control in relation to the individual to the traditional constitutional limitations.

Placed in the context of the posed university regulation preventing enrollment of members of certain groups or holding "subversive" political beliefs, one can paraphrase the opinion quoted above and ask the necessary and determinative question: In light of the likelihood of substantial restraint upon the exercise of the student's freedom of association, can the university demonstrate an interest in excluding this student sufficient to justify the deterrent effect on this constitutionally protected right? In other words, the test must be a broad balancing of associational rights against university interests. In no case where mere membership is the criterion for exclusion can this writer weigh the balance in favor of the interests contrary to those of the student.

The political orthodoxy which such a posited regulation, if valid, would impose is anathema to the nature of academic freedom. Within the university, knowledge is its own end, not merely a means to an end. The very essence of the institution is epitomized by the spirit of free inquiry: to follow the argument wherever it may lead; to examine, question, and dispute customary ideas and beliefs. To the student, no less than to the scholar, unchallengeable dogma and hypothesis are fundamentally incompatible. The concept of immutable doctrine is repugnant to the very spirit of a university. "The concern of [students] is not merely to add or revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself."[34]

In the case of a student who is sought to be sanctioned or excluded for unpopular political activity, the standard should be much higher than for a teacher before a permissible university interest can be justified. The student has no forum, such as a classroom, with its captive audience over whom he exercises authority. The student does not accept a salary from the state and is not entrusted with the state's interest in educating its youth. The student can only seek his forum and his audience on-campus through the exercise of first amendment rights. He can only seek to be heard and heeded in the open market of thoughtful interchange and discussion. The dulling effects of censorship through the sanctioning process upon the on-campus activist student are more to be feared than the quickening influence of a live interchange of ideas.

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[32] *Id.* at 461.

[33] *Id.* at 463.

[34] Sweezy v. New Hampshire, *supra* note 25 at 263 (concurring opinion).

Viewed in this perspective, it can be seen that a student's claim for academic freedom regarding his political activities really translates itself into a demand for protection, not only for himself, but for society's right to hear what he has to say. The student's academic freedom, in the sense of being free to pursue whatever political philosophy is relevant to him, constitutes the very core of that freedom of speech and association so basic to a free society and so carefully safeguarded by the first amendment.

Recognition of Student Groups

Granting that the constitutionally underscored associational right exists, a brief examination should be made concerning the university's power to withhold recognition from those groups which do form within the student body. Even the bare right to form an associational group would seem to be dependent upon the character of the organization. Thus, if the objective of the organization is entirely illegal, for example to steal and sell library books, the university could probably prohibit the mere formation of the group upon pain of expulsion or exclusion. The question becomes less clear in the case of an organization which forms and has several objectives, some of which are legal and some illegal. For example, the campus formation of a chapter of the extremist Minutemen or Black Panther groups may have as companion objectives the advocacy of violence and the active engagement in gathering arms and teaching their use. The significant point here is that it is impossible to construct a meaningful constitutional limitation on university power based on a generalized notion of the right to form an association. The legal doctrine that protects associational rights must be able to distinguish between them and afford the required measure of protection in each case.

In recognizing that freedom of association is for students, as well as other citizens, "part of the bundle of rights protected by the First Amendment,"[35] one can logically assert that the university, like any other agent of government, can intervene in the posed situation only when "belief, thought, or expression moves into the realm of action that is inimical to society."[36] Surely the university cannot broadly prohibit students with common interests from joining together in group advocacy, thus the logical corollary must be that for the university to choose to recognize some groups and refuse to recognize others is an indirect intrusion on associational freedoms which would be impermissible if attempted directly. The outer limits of acceptable regulation will be discussed later in some detail, but basi-

[35] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 568-69 (Douglas, J. *concurring*, 1963). *See also*, Brotherhood of R. R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

[36] Gibson v. Florida Legislation Investigation Comm., 372 U.S. 539, 573. (Douglas, J. *Concurring*).

cally, such regulation must be a reasonable limitation on the time, place, and manner of the exercise of group advocacy. If reasonable, these regulations are undeniably a matter of legitimate concern to the university and their impact on the expressional and associational rights being pursued are, or should be, too remote to act as an infringement thereon.

In perspective, the shifting public opinion might be satisfied if by non-recognition the university were able to stifle unpopular viewpoints on the campus. It is precisely here, however, that the protections of the first amendment come into play, serving as a shield both for those who would express unpopular or unsound views and for those who, while profoundly disagreeing with those views, would protect the right to express them. The university which views its position in such a light, despite pressures to the contrary, upholds the great principles that underlie the first amendment; principles long ago expressed by Mr. Justice Holmes in one of his landmark dissenting opinions:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country . . . .[37]

Student Loyalty Oaths as Prerequisite to Enrollment

The requirement by a university that as a condition of enrollment each student execute a loyalty oath would be reflective of a basic misunderstanding of the educational process. It would be a serious omission to disregard the import of the fundamental issue involved in such a regulation. For upon the resolution of that issue turns not only a rational view of loyalty oaths, but the potential success of our educational system in achieving its goals. Simply stated, the fundamental cleavage is this: there can be no agreement between those people who regard education as a means of instilling and propagating certain definite and approved beliefs, and those other people who think that, above all else, education should produce a disciplined and critical mind with the power of independent judgment.[38]

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[37] Abrams v. United States, 250 U.S. 616, 630 (1919).

[38] *See*, Chafee, The Blessings of Liberty 241 (1956): "The government pays judges, but it does not tell them how to decide. An independent . . . university is as essential to the community as an independent judiciary."

A university which would prescribe a loyalty oath as a condition of enrollment, consciously or unconsciously, would lend its support to the first view. In its fervor to cope with what may be perceived as the threat to our free institutions, the university has as its aim the assurance that only those people who espouse "Americanism" will be among its student body, believing that by so doing, our institutions of liberty can be saved and perpetuated. This philosophy is guilty of the error of confusing loyalty with mere orthodoxy. In exhibiting the fear and distrust of student political beliefs, the university which promulgates such a rule of admission comes very near being as doctrinaire as the subversive influences it seeks to quell. Inherent in such a regulation is the definition of loyalty as the non-existence of dissent and political diversity.

Two arresting justifications for a student loyalty oath requirement are: (1) the subversive student is committed to the destruction of democratic institutions, including academic freedom, and is therefore not entitled to the privileges of academic freedom, and (2) the subversive student is a member of a criminal conspiracy and therefore should be excluded from the educational facilities provided by the state.[39]

The first argument for automatic exclusion may be more cogently paraphrased in a slogan: "No freedom for the enemies of freedom."[40] The grievance here is that a subversive person should dare raise the banner of academic freedom in his defense, when it is well known that academic freedom would not be tolerated under the political and social system which he advocates. This raises the curious spectre of granting academic freedom only to those people who believe in it. There is no more reason to make belief in academic freedom a condition of sharing in the concept than there would in making belief in the efficacy of a wonder drug a condition for taking the drug. More important is the belief that if the ideals of our society are valid, they can withstand criticism, especially subversive criticism. In this regard, the observation is relevant that ". . . if we silence him [the advocate of totalitarian institutions] we have actually abrogated freedom of speech, whereas he has merely talked about doing so."[41]

The second argument advanced to support the loyalty oath was treated above. This ground states an assumption not acceptable to the courts; that all membership is culpable, and that mere membership or knowing participation in a subversive group is proof of personal guilt in seeking to achieve those unlawful goals.

Both of these rationale show a fundamental ambivalence toward education. On the one hand, the university seeks to assure itself that, notwithstanding the present conflict with totalitarianism, it will remain free and

[39] Ralph S. Brown, Loyalty and Security 340 (1958).

[40] *Id.* at 341.

[41] F. Mackulp, *On Some Misconceptions Concerning Academic Freedom*, 41 A.A.U.P. BULL. 781 (1951).

courageous in its educational pursuits. Yet, on the other hand, the university seeks to reach this admirable goal by controlled conformity through the populating of its own academic community with only those students (and presumably faculty) who possess opinions and attitudes labeled "Americanism" or "antisubversive."

It should become obvious that such a view cannot be co-existent with the survival of the constitutional protection afforded academic freedom. The attempt to teach democratic values by means of indoctrination and propaganda has been held to have the vice of unconstitutionality within it.[42] The same consideration ought to prevail in the equally fundamental area of student selection and admission where the only criteria should be intellectual competence and potential.

This question is entirely speculative since the loyalty oath question as to the enrollment of students has not arisen. However, should such a question appear, the Court should strike the balance in favor of academic freedom. Such a view would allow for the realization of the advice of Thomas Jefferson when he said that a university should be based on ". . . the illimitable freedom of the human mind . . . . We are not afraid to follow truth wherever it may lead, nor [should we be afraid] to tolerate any error so long as reason is left free to combat it."[43]

The agents of subversion have done nothing to our universities or their students which is potentially more dangerous than what the university, in the posed situation, out of fearful insecurity, has done to itself. "To strike freedom of the mind with the fist of patriotism is an old and ugly subtlety."[44] Mr. Justice Black, in *Weiman v. Updegraff*, articulated the writer's thesis regarding loyalty oaths generally and in the posited situation specifically by saying: "Test oaths are notorious tools of tyranny. When used to shackle the mind they are . . . unspeakably odious to a free people."[45]

Use of University Facilities by Student Organizations

If a university elected not to allow the use of its facilities for all nonacademic purposes there would seem to be little ground to support a student allegation of first amendment infringement. A uniform and universally applied policy of not opening university buildings after hours to student groups of any kind appears to be within the power of control over state property which is invested in the institution. The state, and therefore the university, is not under a duty to make its facilities available for public gatherings but, if it elects to do so, it is constitutionally required to grant

[42] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[43] *The Writings of Thomas Jefferson* 196 (H. A. Washington ed. 1853-54).

[44] Adlai Stevenson, *Speeches* 82 (1952).

[45] 344 U.S. 183, 193 (1952).

the use of these facilities "in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all."[46]

All that has been said above concerning the freedom of speech and association as those protected privileges pertain to students would be of little value if the state through its university officials were able to effectively prevent their exercise by having the discretionary license over the use of its forums. The university acting in the role of censor is out of its medium. It is logical to assume that if the university is proscribed from regulating the speech and associational rights of students, except as a sufficient interest justifies, then it is likewise prohibited from denying an otherwise available forum to achieve the same end. The duty of the university, in such a circumstance as this, would appear to be the administrative function of reasonably regulating the use of its buildings as to such matters as hours, number of persons so as to comply with safety requirements, etc. However, the present state of our constitutional jurisprudence makes argument unnecessary to establish the assumption the university may not discriminate against an organization simply because the institution, or even a calculable part of the community, may be hostile to the opinions or program of such an organization.

One must inquire why an institution would seek to prohibit an unpopular or "subversive" group from holding meetings or programs in its buildings when presumably they can hold them elsewhere without arousing fears of baneful consequences. Is it reasonable to suppose that meetings which would be harmless if held elsewhere would take on an especially sinister quality in a school building? When one searches deeper for the reason that motivates the prohibition, there is no escaping the conclusion that denial is based not on the fear that the meetings or programs pose a clear and present danger to the university community, but because the institutional authorities believe the privilege of free and nondiscriminatory assembly should be denied to those whose convictions and affiliations should not be tolerated. Since the university cannot compel a renunciation of convictions and affiliations as prerequisites to enrollment, a paraphrase of *Hannegan v. Esquire*[47] is here relevant to the effect that the university cannot regulate through its custodial power over its facilities the freedom of assembly and association which, if attempted directly, would contravene constitutional principles. In dealing with a situation such as herein posed, the institution should not be heard to argue that off-campus facilities are available to the prohibited groups. "The Constitution deals with substance, not shadows."[48]

There is a close analogy between seeking to prohibit the use of school facilities to certain groups and the attempted suppression of such a public

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[46] Brown v. Louisiana, 383 U.S. 131, 143 (1966).

[47] 327 U.S. 146 (1946).

[48] Cummings v. Missouri, 4 Wall. 277 (1866).

meeting by criminal prosecution held invalid in *De Jonge v. Oregon*.[49] In that case, a defendant was convicted of presiding over a public meeting held under the auspices of an organization advocating criminal syndicalism, even though the meeting itself was not devoted to that advocacy. The Supreme Court in reversing the conviction held that:

> While the states are entitled to protect themselves from the abuse of the privileges of our institutions . . . none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly. . . . These rights may be abused by using speech or assembly in order to incite to violence or crime. The people . . . may protect themselves against that abuse. . . . [T]he rights themselves must not be curtailed.[50]

If the student organization has committed crimes elsewhere, if they have gathered to engage in or are engaged in a conspiracy against the public order, they may be prosecuted for their conspiracy under law. But it is totally different to seek to proscribe such assembly based on the disapproval of the group's objectives and affiliations.[51]

The public university which holds itself out to the community as the training ground of tomorrow's leaders and, on the contrary, seeks to promulgate and enforce a proscriptive regulation such as the one here speculated is in a most anomalous and untenable situation at best. Indeed, when the principles of free speech and assembly are at stake, the university has more to gain than to lose by a generous tolerance of the convictions and affiliations of its student groups so long as these groups present no clear and present danger to the academic or social community.[52]

It is of little merit to hear the counter assertion that there can be no infringement on first amendment exercises because the university is only raising an unmet criterion as a condition precedent to the use of its facilities. Here the university's sole criterion upon which it conditions the use of its facilities is that those who use the facilities refrain from the advocacy of subversive doctrine. As will be seen in some detail later, the Supreme Court has rejected the argument that states, and their subordinate parts, are free from constitutional limitations in determining the conditions upon which benefits or privileges will be granted, stating in *Sherbert v. Verner*,[53] "It is too late in the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing conditions upon a benefit or privilege."[54]

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[49] 299 U.S. 353 (1937).

[50] *Id.* at 364.

[51] Danskin v. San Diego Unified School Dist., 171 P.2d 885 (1946); *See also*, Near v. Minnesota, 283 U.S. 697 (1931).

[52] *See generally*, East Meadow Community Concerts Assoc. v. Board of Education Dist. 3, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.2d 341 (1966), *re-aff'd per curiam after remand*, 19 N.Y.2d 605, 224 N.E.2d 888, 278 N.Y.S.2d 393 (1967); Danskin v. San Diego Unified School Dist. *supra* note 51.

[53] 374 U.S. 398 (1963).

[54] *Id.* at 404; *See also*, Garrity v. New Jersey, 385 U.S. 493 (1967); Elfbrandt v. Russell,

Student Invitations to Controversial Speakers

No single issue in the continuing debate over academic freedom for students has aroused more recent attention than the invitation of off-campus speakers. Students state their platform:

> U. S. National Student Association supports the right to hear in live confrontation an off-campus speaker enunciate any opinion, regardless of its public popularity and regardless of the speaker's political beliefs or associations, his intellectual merits, or the possibility of causing a public disturbance.[55]

The American Association of University Professors backs them up:

> Any person who is presented by a recognized student organization should be allowed to speak on a college or university campus. Institutional control of the use of campuus facilities by studuent organizations for meetings and other organizational purposes should not be employed as a device to censor or prohibit controversial speakers or the discussion of controversial topics. The only controls which may be imposed are those required by orderly scheduling of the use of space.[56]

Finally, the American Civil Liberties Union supports the student position:

> Students should be accorded the right to assemble, to select speakers and to discuss issues of their choice. When a student organization wishes to invite an outside speaker it should give sufficient notice to the college administration. The latter may properly inform the group's leaders of its views in the matter but should leave the final decision to them. Permission should not be withheld because the speaker is a controversial figure. It can be made clear to the public that an invitation to a speaker does not necessarily imply approval of his views by either the student group or the college administration. Students should enjoy the same right as other citizens to hear different points of view and draw their own conclusions. At the same time, faculty members and college administrators may if they wish acquaint students with the nature of the organizations and causes that seek to enlist student support.[57]

Universities have traditionally served as public forums. The college platform has been a favorite place to launch many of our society's most profound visions, far-reaching programs, and, sometimes, most bitter attacks. The preference of speakers for the university platform reflects society's recognition of the dignity of the academic atmosphere, its traditions

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supra note 28; Speiser v. Randall, 357 U.S. 513 (1958); Slochower v. Board of Higher Education, 350 U.S.; 551 (1956).

[55] *Student Dimensions, Codification of Policy of the United States National Student Association*, U.S.N.S.A. 115 (1963-64).

[56] American Association of University Professors, Committee "S," *Statement on Faculty Responsibility for the Academic Freedom of Students*, 50 A.A.U.P. BULL. 255.

[57] *Academic Freedom and Civil Liberties of Students in Colleges and Universities*, A.C.L.U., 7 (1963).

of free speech and fair play, and the respect which society's leaders have for college students and faculty. Winston Churchhill delivered his famous "Iron Curtain" speech in 1946 at Westminster College in Fulton, Missouri. Senator Joseph McCarthy often used the college forum, as did the late President Kennedy and the 1964 Republican nominee Barry Goldwater. Advocates of free love, free land, and free spending have spoken to college audiences, as have atheists, agnostics, Paul Tillich, and Karl Barth. John Birchers and Communists, Madame Nhu and Margaret Chase Smith, Harry Belafonte and Governor George Wallace have spoken at one or another of our colleges. It was at Syracuse University that President Johnson first spelled out American policy concerning Vietnam.

Because views expressed on the campus by public figures extend beyond the campus in their impact, the proper use of this platform is a source of discussion and sometimes division and discontent among students, faculty, trustees, legislators, parents, alumni, contributors, citizens, and community groups.

Controversial speakers present another kind of danger for the institution which is closely linked with the danger of destroying the contemplative academic atmosphere. The university is under constant public scrutiny and, as one administrator laments, "People have not learned to distinguish between 'the college' and the people to whom it would allow a platform." This confusion between the college as a platform for controversial opinions and the college as an advocate of these opinions often takes place. Since it is not clear to the public that listening to radical viewpoints does not imply approval of them, but rather provides case studies for scholarly analysis, citizens' cries of protest sadly miss the point. One lady asked Chancellor Robert Hutchins of the University of Chicago whether it was a fact that communism was taught in his university. He replied, "Yes, madam, and we also teach cancer at our medical school."[58]

The attempt to regulate the use of universities has largely been aimed at the potential speaker who is unpopular because of his political reputation and affiliations. The restrictive regulation used as the basis for denial of its facilities as a forum is commonly a product of the state legislature. An illustrative example can be found in the famous, or, depending on your point of view, the infamous, Illinois Clabaugh Act.[59] That act provides:

> No trustee, official, instructor, or other employee of the University of Illinois shall extend to any subversive, seditious, and un-American organization, or to its representatives, the use of any facilities of the University for the purpose of carrying on, advertising or publicizing the activities of such organization.[60]

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[58] Quoted in, E. G. Williamson and J. L. Cowan, *The American Student's Freedom of Expression: A Research Appraisal*, at 65 (1967).

[59] ILL. REV. STATS. 1967, ch. 144 § 48.8.

[60] See also, N.C. GEN. STAT. ch. 1207 §§ 116-199, 200 (1963), which reads:

While current constitutional theories suggest that such an act is constitutionally defective, it has not yet been subjected to judicial scrutiny. However, in analysis, several of its provisions seem untenable. What, for example, is a "subversive, seditious, and un-American organization?" The Act provides no definition.[61] By its failure to do so it unquestionably has a discouraging effect on the exercise of speech and association due to the probability that student organizations may well be convinced not to invite speakers whom they believe may express unpopular views fearing that through their host/guest relationship they too will be labeled "subversive, seditious, and un-American."

Once again, as with individual political beliefs and affiliations and group recognition, the fact that certain opinions are unpopular or even "un-American" in the sense that they are at variance with the views currently held by most Americans does not deprive them of their protected status under the first amendment.[62] The vagueness of the Clabaugh Act in particular and similar acts in general may thus be said to have a chilling effect on constitutionally permissible speech.[63]

Traditionally, the standard applied by the Supreme Court in judging the constitutionality of restraints on speech has taken the following form: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils [the university] has a right

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AN ACT TO REGULATE VISITING SPEAKERS AT STATE SUPPORTED COLLEGES AND UNIVERSITIES

Section 1. No college or university, which receives any state funds in support thereof, shall permit any person to use the facilities of such college or university for speaking purposes, who:

(A) Is a known member of the Communist Party;

(B) Is known to advocate the overthrow of the Constitution of the United States or the State of North Carolina;

(C) Has pleaded the Fifth Amendment of the Constitution of the United States in refusing to answer any question, with respect to communist or subversive connections, or activities, before any duly constituted legislative committee, any judicial tribunal, or any executive or administrative board of the United States or any state.

[61] In this respect a number of recent decisions have examined college regulations for vagueness and overbreadth in infringing upon first amendment freedoms. *See e.g.*, Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) holding that misconduct is a standard for student expulsion which is too vague when applied to the regulation of protected freedoms; and more specifically, Smith v. University of Tennessee, 300 F. Supp. 777 (E.D. Tenn. 1969) holding that regulations by which an invited speaker was rejected were too broad and vague, thus constituting an unconstitutional restraint on first amendment rights.

[62] *See*, Dunbar v. Governing Board of the Grossmont Junior College District, 275 Cal. App.2d 5, 79 Cal. Rptr. 662 (1969) which held that a college governing board could not exclude a student-invited speaker merely for his being a member of the Communist Party. Applying the protection of the first amendment, the court felt that membership in any organization, no matter how unpopular is not sufficient reason by itself to prevent students from hearing a given speaker in an open debate.

[63] *See* unpublished memorandum, Faculty, College of Law, University of Illinois, Goldberg and La Fave, March 6, 1967.

to prevent."[64] The Court has more recently adopted a modification of this standard by substituting the probability of grave evil for clear and present danger. "In each case the courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[65] Thus modified the requirement of proving imminent danger is reduced to a showing, for example, that the evil will occur tomorrow rather than today.[66]

Universities have experienced difficulty with both parts of the test.[67] They have improperly identified the kinds of evil that are constitutionally within their power to prevent, and they have failed to develop standards by which to isolate speakers whose presence on campus will probably incite violence.

The university, *inter alia*, can surely punish students who assault or sabotage university property. Likewise, the state can punish persons who do similar acts against state interests. If the student-invited speaker was one who made such action (the evil) highly probable, the university should be able to restrain the speech (the probability of its occurance). However, it would be unconstitutional for the university to sanction students who advocate, urge, or incite others to act in a legal and lawful manner to effect a change unpopular to the university. An invited speaker who does the same thing should be likewise protected no matter how strongly his ideas are detested by the university or state.[68]

Thus, the various derivatives of the Clabaugh Act prevent speeches on the campus by many who hold unpopular views but who nonetheless advocate lawful conduct only.[69] Repeal of the McCarran Act or the Clabaugh Act by a vote of the appropriate legislative body could not be punished. Speeches which urge their elimination by lawful means are likewise inviolate. Since the type of action urged by the speaker is not censurable, neither can the university acting as a spokesman for the prevailing majority, in order to insulate itself from change, censor or bar the speech designed to bring about such action.

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[64] Schneck v. United States, 249 U.S. 47, 52 (1919); *accord*, De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).

[65] Dennis v. United States, 341 U.S. 494, 510 (1951).

[66] *See* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[67] There can be no doubt that the application of the first amendment to the states through the fourteenth is likewise incumbent upon state universities. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Education, 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); one court, in dictum, has suggested that the fourteenth amendment may also be applicable to private universities. But such a consideration is beyond the scope of this paper. *See* Guillory v. Tulane University 203 F. Supp. 855 (E.D. La. 1962).

[68] *See* Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969) where the absence of allegations that a speaker's appearance would lead to violence and disorder was significant. The court held the speaker could not be barred solely on the professed grounds that he was a convicted felon and might advocate breaking the law.

[69] *See* Z. Chafee, Free Speech in the United States (1941).

A comprehensive ban such as the cited acts prescribe are constitutionally defective precisely because of their comprehensive and undiscriminating nature. These proscriptive regulations fail to distinguish between the political advocacy urged by the speaker and the resultant conduct. Thus, the ban is aimed at the speaker rather than the course of the conduct likely to result from the speech. This goes too far. It ignores not only the nature of the action urged, but also the "probability" requirement of the Supreme Court test described above. One should logically extend the "probability" criterion to include constitutional protection for a speaker, who although well known for his desire for violent overthrow of our system, is invited to speak on a topic far removed from that political goal. He should not be barred on this occasion because the speech he proposes to make will carry no probability of incitation to violence or unlawful action.[70]

There remains another purported justification for barring certain student-invited controversial speakers from use of university speaking facilities. It is based on the idea that although the speaker himself may not urge or incite violence, those who oppose his views would precipitate the violence. Superficially, this reactive form of violence would seem to equally justify suppression due to the threat of disorder. This theory is not without some limited degree of constitutional support.[71] However, the application of this idea should be very narrowly limited to those occasions where opposition to the speaker "rises far above public inconvenience, annoyance, or unrest."[72] The widespread application of such an idea would simply invite those who would suppress the speaker's exercise of free speech to create the threat needed to justify offiicial restraint by the university. The Supreme Court has made equally clear the concept that "constitutional rights are not to be sacrificed or yielded to . . . violence and disorder."[73]

It has been said earlier regarding the use of university facilities by student groups, and it will be mentioned again below in another context, that a university has no obligation to allow the extracurricular use of its facilities. However, the legal duty of non-discriminatory standards arises when such facilities are made available.[74] To paraphrase the Supreme Court, the question here is not a duty of the university to supply speaking facilities, but of its duty when it provides such facilities to furnish them upon the basis of an equality of right.[75]

Aside from the constitutional questions, one should ask, in evaluating

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[70] *See* De Jonge v. Oregon, *supra* note 64.

[71] *See* Niemotko v. Maryland, 340 U.S. 268 *esp.* at 289 (1951); Feiner v. New York, 340 U.S. 315 (1951).

[72] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[73] Cooper v. Aaron, *supra* note 67.

[74] See cases cited in footnote 52.

[75] *Paraphrasing*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938).

the imposition of a Clabaugh Act or a university promulgated regulation barring certain speakers from campus forums, whether or not the action violates commonly accepted principles of academic freedom.

A university is often considered to function solely in order to transmit an intellectual heritage and, in so doing, to enrich it. The advocates of these restrictive laws insist that the university does not owe subversive or un-American persons the right to promote their cause from state platforms. But more important than what the university does not owe these unpopular people and causes is what it *does* owe its students. It owes them the evidence of a conviction that there has been found no better means of ascertaining the truth than the response of the public to the open forum. Of course, that response is by no means infallible, but democracy is based on the assumption that it is far less fallible than any authoritarian judge. Speaker bans suggest that the university cannot trust to the freedom of inquiry and that its authoritarian judgment should replace the open forum. These restrictive provisions, while not affecting classroom discussion or faculty research, surely have an adverse and negative effect on the academic environment. The free flow of ideas, so inherent in the university, is impaired. Such impairment can only act to deny to the student the opportunity to sharpen and enlarge his mental faculties through healthy personal dialogue with these spokesmen of variant views. The resultant anti-intellectualism[76] can only work to the disadvantage of our educational process and indeed, our future as a free thinking, tolerant people. John Stuart Mill's classic point applies here:

> [T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit,

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[76] The conviction among some citizens that radicals should be denied the university forum is mirrored in the creation of an Emergency Committee to Halt the Spread of Nazism in American Colleges and Universities, a group dedicated to silencing the late George Lincoln Rockwell. The statement of the purpose of the organization reads in part:

> College and university students are simply too ill-informed and immature to be allowed to judge Rockwell themselves. He is too slick for them and too pat—too devilishly clever to permit students to expose themselves to him. To allow college and university students to hear Rockwell is NOT "free speech." It is exactly like letting babies sample poisoned candy. They don't know enough—they haven't experience enough—to judge for themselves whether they should even try a sample . . . the average college student, while he feels himself well-informed and mature in judgment is actually a born sucker for the kind of slick facts and "Alice in Wonderland" arguments of demagogues like Rockwell. J. Carlson and J. Cohen, *Emergency Committee to Halt the Spread of Nazism in American Colleges and Universities*, Mimeograph at 3, (1964).

This quotation gives a good indication of the depth of feeling that inspires the antipathy of some community groups, and their consequent persistence. A college administrator who wishes to implement a liberal interpretation of freedom of speech at his campus invites the antagonism of these groups whose outcries can, if the community at large is receptive, do much to limit his freedom in decision-making.

the clearer perception and livelier impression of truth, produced by its collision with error.[77]

III. Miscellaneous and Demonstrative Student Activities Having First Amendment Implications

1. A student newspaper editor, against the counsel of a faculty advisor and in violation of a known university policy, published a well written editorial containing criticism of the Governor and the state legislature. The university rule which the student violated proscribed only adverse editorials, not those laudatory of state governmental activities. Disciplinary action is now sought against the student based on the theory that since the state is the owner of the university and its newspaper, the proscriptive rule is valid and enforceable.

2. An adult female university student was employed as a model by a well known men's magazine. In a city distant from the university campus the female student posed for several pictures which ultimately appeared in the magazine. One of these pictures shows the student in an artistic pose semi-nude on a sand dune. The university now seeks to impose sanctions upon the student for what it calls "conduct unbecoming to a lady."

The above situations pose a not untypical theoretical problem in today's university community which leads to the question in the university/student context: What substantive regulations may a university impose on a student's speech and speech related activities and remain consistent with constitutional principles?

The problem raised by the female student's activity involves the off-campus power of a university to impose sanctions on students for conduct that is otherwise legitimate when engaged in by a non-student. Therefore, the power, if it exists at all, must be based on an overriding interest by the institution, authorized by the student/university status then extant. This type of off-campus power will be examined later.

The problems inherent in the situation of the college newspaper editor raise the thus far unanswered questions: To what extent is student academic freedom supported by constitutional underpinnings? What are the limits beyond which institutional authorities cannot go in deterring student actions which, in areas outside the institutional community, would clearly be protected by the first amendment against interference from other state machinery?

The U. S. National Student Association has been continually interested in student academic freedom and recently endorsed a *Joint Statement of Rights and Freedoms of Students* approved by the Council of the American Association of University Professors. In pertinent part the statement reads:

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[77] John Stuart Mill, On Liberty 16 (Crofts Classics ed. 1947).

> Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth.[78]

Courts have shown no reluctance to settle controversies involving first amendment rights, particularly where some aspect of academic freedom has been at stake. The import of protecting academic freedom under the canopy of the first amendment was demonstrated by the Supreme Court in *Sweezy v. New Hampshire*[79] where the Court said:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democary that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. . . . Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die.[80] (Emphasis added)

Sweezy's continuing validity is illustrated by its favorable citation in the recent cases of *Whitehill v. Elkins*[81] and *Keyishian v. Board of Regents*.[82] While on their facts, *Whitehill* and *Keyishian* differ from *Sweezy* and the posed case, [83] the applicability of the principles of academic freedom is more than arguably relevant.

The difference in status between a teacher and student cannot be considered so vast as to render nugatory the principle discernible from this line of decisions, namely, that there is established a substantial degree of academic freedom for students and faculty which is protected from government interdiction. Surely one could not successfully seize on the factual distinction posed in the student editor's case, i.e.: that his status as a student renders him without the scope of the cited cases. Even though the Supreme Court has decided no cases specifically concerning student *vis-a-vis* faculty academic freedom, the *Sweezy* Court pointedly, albeit gratuitously, stated that students as well as teachers must always remain free to inquire, to study, and to evaluate within the framework of academic freedom principles.[84]

A fair application of the academic freedom principles in *Sweezy* sup-

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[78] *Joint Statement on Rights and Freedoms of Students*, 53 A.A.U.P. BULL. 365 (1967).

[79] 354 U.S. 234 (1956).

[80] *Id.* at 250.

[81] 389 U.S. 54 (1967).

[82] 385 U.S. 589 (1967).

[83] *Whitehill* and *Keyishian* invalidated teacher loyalty oaths and, *Sweezy* dealt with a state legislative investigation of a college professor's lectures and political beliefs.

[84] *Supra* note 79 at 250.

ports the contention that the sanctions sought to be imposed on our student editor are beyond the outer limits of permissible university regulation.[85] Further, a careful examination of the rationale used by our "hypothetical"[86] university would impose a "strait jacket" of the kind condemned in *Sweezy* not only upon the student editor, but upon all contributors to the newspaper. It should not require argument to assert that such a regulation while not applicable to faculty contributors under *Sweezy* could become operative when the contribution to the newspaper is that of a student.

The university in the posed situation has taken the position that since the state is the owner of the university, adverse commentary directed at the owner cannot be tolerated. This policy is based primarily on the university's desire to maintain its financially favorable position with the governor and state legislature, fearing that adverse commentary will jeopardize its ability to obtain future funds.

In the examination of the university's rationale, one should seek to test its legitimacy by asking and answering the question whether or not the object of the policy is such as to justify the operative restriction. The law and literature of the Supreme Court makes clear that first amendment rights are not absolute. They are subject to restriction, only however, when the governmental purpose is substantial and cannot be achieved through less restrictive alternatives. Within the recent past, the Supreme Court has addressed itself to the issue of first amendment strictures of the type imposed when some governmental interest could be shown, and has found that the establishment of that prerequisite alone does not always meet the permissible constitutional limits.

In *Lamont v. Postmaster General*,[87] the Court, in dealing with a postal regulation seeking to limit the mailable nature of postal matters of communist origin, held that "[In] the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose."[88] Thus it would appear, the legitimate and substantial state interests must not only be shown, but the regulation used to protect those interests must not ". . . broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[89]

The application of the principle expressed in *Lamont* to the analogous

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[85] *See* Antonelli v. Hammond, 308 F. Supp. 1329 (Mass. 1970) where the student editor was required to submit all material to a faculty advisory board for approval prior to printing. The court held this was an unconstitutional restraint on the student's freedom of speech and of the press. Arbitrary restrictions placed upon what may be printed were treated as unenforceable. *But see, also*, Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195 (6th Cir. 1969) in which the dismissal of students for distributing "false and inflamatory" literature was held not to have violated their civil rights.

[86] *Id.*

[87] 381 U.S. 305 (1965).

[88] *Id.* at 310.

[89] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

issue raised in the case of the student editor calls for an examination of whether or not the asserted university interest bears a reasonable relationship to the regulation sought to be exercised. Even if the nexus between the no criticism rule and the financial position of the university within the state government can be shown to be more than merely speculative, the rule should not withstand a constitutional assault. Such a basis for censorship is not even reasonable, much less compelling. To successfully place a student editor under such a condition as the no criticism rule would be not too unlike the exaction from him of a species of loyalty oath; namely, conformity by publishing only laudatory articles of the officials in state power and of state political activity, the breach of which will result in dismissal from the university community. There is a striking similarity between the posed university regulation and one which would require a student editor to profess a religious faith not his own or to be the mouthpiece of political orthodoxy.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[90]

If the no criticism rule could be found to be based on the rationale that administrative censorship is necessary to achieve high standards of journalism in the student newspaper, the regulation in question here might, if exercised reasonably, meet first amendment limitation criteria. This might also be the case if the rule were bottomed on the premise that the newspaper should be a forum for the presentation of diverse views or, in specific circumstances, to insure or achieve order and decorum on the campus. But in the posed case, none of these qualifiedly acceptable premises are put forward. The resultant effect can only be viewed as the type which was condemned by the Court of Appeals for the Fifth Circuit in *Burnside v. Byars*[91] and *Blackwell v. Issaquena County Board of Education*.[92] In each of those cases students were sought to be disciplined for wearing buttons advocating a position on a politically sensitive issue and, in each case, the court took a position clearly analogous to *Lamont* while at the same time recognizing the extension of first amendment principles to students. The court expressed the rule that:

> [School officials] cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment . . . where the exercise of such rights . . . do not materially and substan-

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[90] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

[91] 363 F.2d 744 (5th Cir. 1966).

[92] 363 F.2d 749 (5th Cir. 1966).

> tially interfere with the requirements of appropriate discipline in the operation of the school.[93]

The court in *Blackwell* cites with favor the Supreme Court's holding in *West Virginia State Board of Education v. Barnette*[94] that "[T]he Fourteenth Amendment, as now applied to the states, protects the citizens against the State itself and all of its creatures—Boards of Education not excepted."[95]

The recent case of *Tinker v. Des Moines Independent Community School District*[96] provides the first Supreme Court decision which faces squarely the application of the first amendment to such student expressions as were present in *Burnside* and *Blackwell*. *Tinker* involved an action for nominal damages and injunctive relief brought on behalf of three school children. The children were sent home from school for violating a regulation which sought to forbid the wearing of black arm bands to school "to mourn those who had died in the Viet Nam War and to support the late Senator Robert Kennedy's proposal that the truce proposed for Christmas Day, 1965, be extended indefinitely."[97]

The district court in *Tinker* expressly refused to follow *Burnside* or *Blackwell* in holding that the disciplined decorum of the classroom should take precedence over the plaintiffs' right of speech.[98] Following an affirmance by an evenly divided Court of Appeals for the Eighth Circuit,[99] the Supreme Court granted *certiorari*[100] and reversed the lower court.[101]

The Court, speaking through Justice Fortas, clearly reaffirmed that, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[102] The wearing of armbands was considered a form of expression closely related to "pure speech" and therefore constitutionally protected.

In determining whether this form of expression could be prohibited in the school environment, the Court adopted the *Burnside* test.

> Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operations of the school' the prohibition cannot be sustained.[103]

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[93] Burnside, *supra* note 91 at 749.
[94] 319 U.S. 624 (1943).
[95] *Id.* at 637.
[96] 393 U.S. 503 (1969).
[97] 258 F. Supp. 971, 972 (S.D. Iowa 1966).
[98] 258 F. Supp. 971.
[99] 383 F.2d 988 (8th Cir. 1967).
[100] 390 U.S. 942 (1968).
[101] 393 U.S. 503 (1969).
[102] *Id.* at 506.
[103] *Id.* at 509.

Lacking a record which showed such a disruptive effect, the Court held in *Tinker* that the wearing of armbands could not constitutionally be prohibited. Similarly, the student editor, publishing a well written but critical editorial, would appear to be engaged in a non-disruptive mode of expression within the protection of the first amendment.

Admittedly, the problem of fund-raising provides an added factor in the student editor case. There is no doubt that fund-raising represents an important interest of a state-supported institution. This writer is not so naive as to overlook the obvious practicalities involved in obtaining legislative appropriations. Moreover, it should be acknowledged that institutions have a valid interest in encouraging students to respect faculty authority. However, when faculty and administrators exceed their authority and tread heavily on important first amendment rights to enforce a student's submission to authority as a means to satisfy the practicalities of fund-raising, it is they who are placing themselves above duly constituted authority, not the student.

Finally, one must ask if the no criticism rule really expresses a *state* interest. The interest detailed above is purposely called that of a "state interest" because that label accurately characterizes the extant condition. The interest of the university in obtaining legislative appropriations is purely an institutional one; it is the power to provide the funds and thus satisfy their interest which rests in the state. Consequently, it cannot be said that the overriding "state" interest is to obtain funds for one of its institutions. More accurately portrayed, the state's interest here is to use its control of funds as a lever to regulate critical comments on state government. It would appear patently absured to allow a university to convert its admittedly substantial and legitimate *institutional* interest into a similar *state* interest where the state itself can satisfy the institutional needs. To view it otherwise would permit a state government to coerce university authorities into an unconstitutional exercise of power which the state clearly could not directly do itself.

A central purpose of the first amendment is to prevent the use of government power to coerce political or religious conformity whether it be through the compulsory nature of the type condemned in *Barnette* or the "chilling"[104] type of negative compulsion which acts to silence first amendment expressions. A university regulation limiting a student editor to laudatory comments only when writing about state political activities can only be said to impose the latter type of impermissible stricture of first amendment expresson.

The value of student publications on university campuses has been rec-

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[104] *See generally*, Dombrowski v. Pfister, 308 U.S. 479 (1965); Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1965).

ognized by the U. S. National Student Association and endorsed by the Council of the American Association of University Professors thusly:

> Student publications and the student press are a valuable aid in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on the campus. They are a means of bringing student concerns to the attention of the faculty and the institutional authorities and of formulating student opinion on various issues on the campus and in the world at large.[105]

The American Civil Liberties Union in speaking to the same matter has taken a position similar to the NSA and AAUP by saying:

> . . . [T]he college administration which takes no steps to control the content of a student publication, and refrains, in a controversial situation from suspending or . . . penalizing one or more student editors, testifies to its belief in the principles of academic freedom and freedom of the press.[106]

The campus newspaper editor should be viewed in the same first amendment light as a political science or law professor. He, as much as they, is appointed to use the institution's facilities to discuss current issues; they in the classroom and he in the newspaper. The very purpose of having a newspaper on a campus is to allow superior journalism students to communicate with the academic community concerning events of current interest. To put the student editor in the position of knowing that there is incumbent upon him a vague proscription concerning the publication of "adverse" comments on state political activity can only act to, potentially at least, frustrate first amendment expression. This is not to say that a more definitive and narrowly drawn proscription of a similar sort would pass constitutional muster, surely it would not. In either case ". . . [T]he threat of sanctions may deter . . . as potently as the actual application of sanctions. . . ."[107] The chilling effect on the editor's writing activities are no less onerous than the "chilling" effect found constitutionally defective in *Dombrowski v. Pfister*.[108] In the posed case, free expression, which is a transcendent value to all society, might be the ultimate loser.[109]

In today's constitutional jurisprudence, it is clear that a state may not operate a public school or park outside of requirements imposed by the fourteenth amendment. It follows that a state cannot exempt its universities from the first amendment, particularly where academic discussion is concerned. This should be true even though the state asserts a claim of "ownership" of the campus newspaper. Although the state may be said to

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[105] *Joint Statement on Rights and Freedom*, 53 A.A.U.P. BULL. 365, 367 (1967).

[106] *American Civil Liberties Union Statement on the Academic Freedom and Civil Liberties of Students*, 6 (1965).

[107] N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

[108] 380 U.S. 479 (1965).

[109] *Id.* at 486.

"own" the university in a technical sense, it does not seem to have the type of proprietary interest which would permit the imposition of first amendment abridging regulations. Logic impells the view that state "ownership" is as much a manifestation of state action as is an act of the legislature.

The student editor should be viewed as a citizen who is protected if his views expressed in his editorial columns suggest that government and political officials are not infallible. The recent majority view of *Mills v. Alabama*[110] is clearly analogous to this proffered position:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes . . . the manner in which government is operated, and all such matters relating to political processes . . . Supression of the right of the press to praise *or criticize* governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.[111] (Emphasis added).

Mills involved a state criminal statute punishing any newspaper editor who published an editorial on election day endorsing a candidate for office. Although *Mills* concerned a private newspaper, the state, in the case of our student editor, surely can show no greater interest in supressing critical discussions in a student newspaper. Indeed, the state's interest should more logically be focused on improving government administration and stimulating the academic environment of its universities. The ideal of *New York Times v. Sullivan*[112] should be a constant thread through the fabric of a state's concept of its institutions of higher learning. That view should be based on the premise: ". . . that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[113]

Cases like *Tinker*, *Blackwell* and *Burnside*, discussed above, indicate that the complex and sensitive area of university discipline will be the subject of judicial scrutiny in its substantive effects as well as the procedural standard made extant through the *Dixon* and *Knight* decisions also discussed above.

Recently, *Hammond v. South Carolina State College*[114] presented a disciplinary case based on the failure of the students involved in a mass demonstration to obtain advance permission. The rule requiring such advance permission was clearly stated in the Student Handbook.[115] The procedures

[110] 384 U.S. 214 (1966).

[111] *Id.* at 218-19.

[112] 376 U.S. 254 (1964).

[113] *Id.* at 270.

[114] 272 F. Supp. 947 (S.C. 1967).

[115] The regulation in pertinent part reads: "The student body or any part of the student body

which followed this violation of the university rule cannot be condemned as violative of due process. In fact, a rehearing was had by the students after the initial one resulted in their suspension. Therefore, the only issue to be addressed in *Hammond* was whether or not the university rule, through its prospective and actual application, fell afoul of the students' first amendment rights.

The basis of the rule in *Hammond* was expressed by the school's Board of Trustees in passing a resolution which stated ". . . in the avowed interest of protecting the students of this institution from violence and to preserve public peace and order . . . Be it resolved that hereafter any student . . . who shall engage in *any* public demonstrations without prior approval . . . shall be summarily expelled."[116] (Emphasis added.)

The court recognized that the purpose of the rule was to keep order on the campus and prevent chaos. Surely one cannot doubt that the preservation of a peaceful academic atmosphere is an integral part of an institution's function and, that without the power to insist on a standard of deportment, the administrative authorities cannot guarantee the carrying on of the business of education.

The court in *Hammond*, while not citing *Burnside*, extended the *Burnside's* doctrine of material and substantial interference in the school's operation to one more closely resembling Supreme Court pronouncements in demonstration cases. The court in applying the same standards to students as are generally applicable to those not on the campus said: "These rights of the First Amendment, including the right to peaceably assemble, are not to be restricted except upon the showing of a clear and present danger, of riot, disorder, or immediate threat to public safety, peace, or order."[117]

The relevance of *Hammond* to the case of the student editor is clear. Now not only must the university show that the adverse comments on state political activity contained in the newspaper might materially and substantially interfere with the school's operation, but there must also be met the higher standard of showing a clear and present danger.[118] Without this showing, the principles of academic freedom and the first amendment take precedence over whatever other interest the university may have.

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is not to celebrate, parade, or demonstrate on the campus at any time without the approval of the Office of the President." *South Carolina State College Student Handbook*, Rule 4(1), p. 49.

116 *Cited* in Hammond v. South Carolina State College, *supra* note 114 at 949. *See also*, Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968) which upheld a college rule requiring 48 hours advance notice prior to any mass demonstration. In finding no restraint on protected freedoms, the court distinguished *Hammond*, stating that the regulation in *Powe* only required notice be given and not that approval be obtained.

117 *Supra* note 114 at 950.

118 *See* Cox v. Louisiana, 379 U.S. 536 (1965); *Compare*, Adderley v. Florida, 385 U.S. 39 (1966) where the nature of the right of assembly and demonstration became subject to a special limitation, that being, the nature of the place which is the object of the demonstration; and, Edwards v. South Carolina, 372 U.S. 229 (1963) as to the nature of state property in general as a place for demonstration.

The argument is that since the student editor took his position knowing in advance the university's editorial control policy, and that since appointment to his position is a privilege conferred by the university, no first amendment right can be said to have been violated. What such a position assumes is that in order to obtain the grant of the privilege conferring the editor's post on him, the student relinquishes his claim on certain first amendment rights.

This idea was examined above in regard to the privilege/right dichotomy of attendance at a university. There, it will be recalled, it was shown that a university cannot condition attendance upon the waiver of the right to be free from administrative action lacking in procedural due process requirements. The denunciation of this unconstitutional condition theory has not been limited to procedural due process. Its full force and meaning have equal force in instances in which first amendment claims arise. It is no more constitutionally permissible to condition the grant of a benefit on the exchange waiver of a substantive right then it is to do so regarding procedural due process.

The leading case in applying the unconstitutional condition prohibition to first amendment questions is *Speiser v. Randall*.[119] Before *Speiser*, the examination of the unconstitutional conditions doctrine came primarily from employment loyalty oath cases.[120] *Speiser*, however, dealt with a prelabeled exercise in "legislative grace" in which the California legislature provided for a tax exemption "privilege" for all veterans who executed a loyalty oath. There the normatively ambiguous term of privilege was apparently not open to conclusionary characterization. The legislature had made it clear that their largesse extended only to those who met the statutory criteria. The state asserted logically that an exemption from an otherwise statutory duty could not cause a constitutional infringement to one not exempt. The Court, in rejecting the state's position, held that the exemption statute sought to stifle the first amendment exercise of free speech through the incentive of tax relief, and in so doing was a suppression of first amendment rights without any concomitant compelling state interest to ". . . justify the short cut procedure. . . ."[121] The Court made it clear that a condition imposed upon the grant of a privilege must be reasonable.

Just as there was no obligation to provide the tax relief at issue in *Speiser*, there is no constitutional compulsion for a state to provide universities and colleges. However, in electing to provide such beneficial institutions, it is well settled that the state is not free to do so in a manner which abridges constitutionally protected rights. *Brown v. Board of Educa-*

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[119] 357 U.S. 513 (1958).

[120] *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); Sweezy v. New Hampshire, *supra* note 25; Wieman v. Updegraff, 344 U.S. 183 (1952).

[121] Speiser, *supra* note 54 at 529.

tion[122] proved that this doctrine is viable in the primary function of education. Recent cases of various origin provide a basis for asserting that the unconstitutional condition doctrine is applicable also in the educationally ancillary matters.[123] Such a case dealing with these ancillary matters, and analogous to the student in his exercise of first amendment rights, is *Danskin v. San Diego Unified School District.*[124] There, the local civil liberties union applied to use a public school for a meeting on the Bill of Rights. The group refused to sign a broad loyalty oath as a condition of their using the facility. The California Supreme Court, in a landmark opinion, held that the school had no duty to allow use of its facilities, but that when it did, it could not condition their use on criteria which inhibited the exercise of first amendment rights. Justice Traynor for the court said: "A state is without the power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property."[125]

The theory adopted by Justice Traynor and the court in *Danskin* finds acceptance today by leading state courts regarding the use of school facilities *vis-a-vis* first amendment exercise questions.[126] Most recently, the New York Court of Appeals applied the *Danskin* theory in a case where school officials withdrew their authorization for the use of school facilities when they decided that folk singer Peter Seeger was too "controversial." The court granted an injunction against further discrimination by the school officials.[127]

The result for the student of the demise of the unconstitutional condition doctrine should be a recognition that a state is prohibited from granting a benefit to him only in exchange for his relinquishing what would be a constitutional right if the student had obtained the benefit without government cooperation. More specifically, the college editor in the posed situation would be lifted from his dilemma. If the conditioning of the benefit were viable, the editor would not be subject to sanction because he chose to write about state politics, but only because he did so in a critical way. He could fill his columns with comments praising state government,

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[122] 347 U.S. 483 (1954).

[123] Egan v. Moore, 20 App. Div. 2d 150, 245 N.Y.S.2d 622 (3rd Dep't. 1963), *aff'd. mem.*, 14 N.Y.2d 775, 199 N.E.2d 842, 250 N.Y.S.2d 809 (1964) (State university cannot exclude invited lecturer from presenting discussion on politics where invitee was a member of the Communist Party); Ellis v. Allen, 4 App. Div. 2d 343, 165 N.Y.S.2d 624 (3rd Dep't. 1957) (School board cannot exclude peace organization from use of its buildings as long as it allows other groups their use); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d (Sup. Ct. 1962) (Hunter College cannot exclude conservative editor from using auditorium for political forum).

[124] 28 Cal. 2d 536, 171 P.2d 885 (1946).

[125] *Id.* at 892.

[126] *See* cases cited in footnote 123 *supra.*

[127] East Meadow Community Concerts Ass'n. v. Board of Education, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966), *re-aff'd per curiam after remand*, 19 N.Y.2d 605, 224 N.E.2d 888, 278 N.Y.S.2d 393 (1967).

but if he changed his evaluation he would be forced to write on a different subject. To deny the applicability of the first amendment to the student editor would be tantamount to subsidizing those who conform politically and penalizing those who do not.

Sherbert v. Verner[128] involved an analogous situation which illustrates the wide scope of the unconstitutional conditions doctrine in dealing with first amendment issues. Plaintiff, a Seventh Day Adventist, was discharged from her employment because she conscientiously refused to work on Saturday, her religious day of rest. The South Carolina Employment Security Commission refused to pay her unemployment compensation insurance because she would not work on her Sabbath. On appeal, the Supreme Court reversed and emphasized an important point which is relevant to the case of the student editor. In writing for the Court, Mr. Justice Brennan adhered to the Court's earlier view as expressed in *Speiser*, that benefits could not be conditioned with indirect burdens on first amendment rights. In finding that the state's claim that Mrs. Verner could hold and express her beliefs at any time except the Saturday working hours, Mr. Justice Brennan said: "[I]t is too late in the day to doubt that the liberties of religion *and expression* may be infringed by the denial of or placing of conditions upon a benefit or privilege."[129] (Emphasis added).

The concerted effect of *Dixon*, denying the contention that a college student has accepted admission on the condition of waiver of his due process rights, and of *Speiser*, *Danskin* and *Sherbert*, denying the power of the state to condition a grant only by allowing an infringement on a first amendment right, should be persuasive in the posed student newspaper case. The effect should be clear that, "[A] state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state supported institution."[130] "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."[131]

If the foregoing is persuasive in advancing the theory that the university may not take punative action against the student writer, the question remains as to the power *vel non* of the university to remove the student editor from his position. Here the answer is surely less clear. As a student merely chosen to serve in his position, is the student editor in the relationship of employee to the university who is in reality the publisher/owner of the newspaper? It would seem that the character of the objection forming the reason for the attempted removal presents the most reasonable path to analysis. If the attempted removal was based on an academically inspired journalistic objection to the quality of the editor's columns, then one

[128] 374 U.S. 298 (1963).

[129] *Id.* at 404.

[130] Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967).

[131] Frost & Frost Co. v. R. R. Commissioner, 271 U.S. 583, 594 (1926).

could easily justify a removal. However, to have the editor's tenure in office based solely on his acquiesence to forego printing editorials critical of state government places the attempted removal in an altogether different light. Whether the editor's interest is here characterized as a "right" or a "privilege" is not decisive because the doctrine of unconstitutional conditions forbids the government use of the "privilege" characterization to achieve objectives which abridge first amendment interests unless the university can show a compelling or overriding and presumably independent justification.

Under the theory of *Dixon*, it can logically be asserted that the interests of the student editor in retaining his position have reached the stage where they cannot be dealt with in the conclusionary terms of right or privilege, but rather they must ". . . be evaluated . . . in terms of their true significance and worth."[132] A journalism student's interest in being a student newspaper editor is as potentially valuable as a law student's interest in becoming a member of the law review. Participation in either form of writing program may enable the student to develop improved writing skills, greater understanding of the role of publications in his chosen profession, and increased marketability of his personal abilities upon graduation. This would seem to be a sufficiently important interest to justify applying the unconstitutional conditions doctrine to the posed contingency.

Speech Plus

While the discussion of the student editor situation is generally demonstrative of the outer limits of permissible regulations, an examination should also be made of other general types of first amendment exercises on campus and their attempted regulation. The above discussions should at least have served to dispel the notion that students are dependent persons subject to only such rights, in areas usually thought of as within the ambit of constitutional protections, as the institutional authorities thought fit to grant them.

The parallel constitutional liberties of speech and assembly which are a necessary part of the academic freedom of students clearly enunciated by the *Dixon* and *Burnside* courts are basic conditions of scholarship, and therefore, basic conditions of any educational enterprise. The constitutionally underscored academic freedom of students cannot be limited to listening in the classroom to professors describing political and social theories. Neither can the mere reading of expressions of thought be said to satisfy the criteria of student academic freedom. The university is generally considered to be the training ground for independent thinking by giving students occasion for thought and opportunities for expression of thought. In this regard, the whole campus, and not just the classroom, must provide

[132] Dixon v. Alabama State Board of Education, *supra* note 1 at 178.

the appropriate conditions to stimulate and encourage thought. Indeed, the classroom is heavily under the teacher's authority, both as an institutional representative and as an established scholar, so that independence of thought if it is to be operative, is to be pursued as much outside the classroom as in it. Therefore, restrictions on expressional exercises by students on campus should be viewed as unacceptable restraints on first amendment interests except as they are necessitated by the protection of institutional activities from disturbance.[133] Even this protection from disturbance should, under the *Hammond* rationale, be measured by the *minimum* requirements of safety, traffic, and the protection of property from misuse.

Not only should the university have the burden to demonstrate in what manner a given rule is necessary to preserve its functions, it should also demonstrate that the functions it assumes and seeks to protect by that rule are themselves constitutionally legitimate. If a recognized and legitimate function of a university is to prepare the student for life in a democratic society, it should appear indefensible to allow the university to incorporate within that function a method constitutionally withdrawn from the state. The university may not promulgate and constitutionally enforce a rule requiring daily chapel attendance or contribution to a religious order through tuition. It seems patently clear that a rule forbidding students from engaging in first amendment exercises would be likewise impermissible. The attempt to prevent this type of activity, even though allegedly justified under some presumed legitimate function such as "inculcating in the student body a sense of good citizenship," should be recognized as an attempt to enforce political orthodoxy. Viewed in that light, the regulation could only be found to be a transgression on constitutional principles.

This is not to say that the university is totally impotent in regulating such activity as picketing on the campus. It may rule against such conduct within the same limitations placed on any governmental community in analogous circumstances. It may rule against such conduct only to the extent that some particular activity disrupts or detracts from its legitimate business. In this regard, a regulation can find constitutional justification only by being applied against the disruptive abuse, not the first amendment rights themselves.[134]

Similar to *Cox v. Louisiana*,[135] a university regulation such as described

[133] Recent decisions firmly hold that students participating in certain non-peaceful and disruptive activities, even though the conduct involves some degree of first amendment expression, are not constitutionally protected from disciplinary action. *See e.g.*, Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968) (disruptive conduct during a football game); Jones v. State Board of Education of and For the State of Tennessee, 279 F. Supp. 190 (M.D. Tenn. 1968) (disruption of a university meeting); Buttney v. Smiley, 281 F. Supp. 280 (Colo., 1968) (physically blocking lawful access to college buildings); and Scott v. Alabama State Board of Education, 300 F. Supp. 163 (M.D. Ala. 1969) (unauthorized seizure and occupation of a college facility).

[134] *See*, De Jonge v. Oregon, *supra* note 64 at 364.

[135] 379 U.S. 536 (1965).

above can be reasonable and enforceable even though intertwined with first amendment exercises. If students were to noisily picket under classroom windows or demonstrate by parading through the library, it is plain that legitimate functions of the university would be impeded.

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.[136]

The cited authority recognizes that picketing involves elements of both speech and conduct in the form of patrolling. It is thus recognized that this intermingling of protected and unprotected activities subjects student picketing to controls that would not be constitutionally permissible in the case of pure speech.[137]

It is likewise clear that the university cannot assert an interest of private property over the campus in order to prevent picketing activity.[138] The same would be true if the student activity engaged in was pamphleteering or handbilling since the constitutional question involved is solely one of right of access for the expression of views. Moreover, the mere title to municipal property standing alone is insufficient to serve as a basis for proscribing first amendment speech related activities without a further consideration of the normal manner in which the property is used.[139]

Universities, as well as streets and parks, have traditionally served the needs of public discussion. The posed event of student picketing on the university campus is surely no less of an exercise of "basic constitutional rights in their most pristine and classic form"[140] than an expression of views in a like manner in front of the state capitol building. Further, the state university is generally viewed as a public place and thus, absent other factors involving the purpose[141] or manner of the picketing, the activity of peaceful student picketing is protected by the first amendment.[142]

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136 *Id.* at 554.

137 *See e.g.*, Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968); Cameron v. Johnson, 381 U.S. 741 (1967); Cox v. Louisiana, 379 U.S. 559 (1964); International Bd. of Teamsters v. Vogt, 354 U.S. 284 (1957).

138 Marsh v. Alabama, 326 U.S. 501 (1946); Lovell v. Griffin, 303 U.S. 444 (1938).

139 Edwards v. South Carolina, *supra* note 118.

140 *Id.* at 235.

141 If picketing is found to be aimed at or involved with an illegal end such as certain coercion or boycotting proscribed by the various labor acts, it falls outside of the scope of first amendment protection. Picketing aimed at such illegal ends will not be herein considered or discussed.

142 Teamsters Local 795 v. Newell 356 U.S. 341 (1958); Thornhill v. Alabama, 310 U.S. 88 (1940); *compare*, Adderley v. Florida, 385 U.S. 39 (1966) where the nature and usual use of the place picketed negatived the concept that state property is normally open to the public. Hence if access can be denied, the situs takes on an aura of quasi-privateness which renders valid proscriptions on even peaceful picketing.

A possible attempted justification for the prohibition of student picketing is likely to be based on a nuisance factor. For example, the alleged nuisance resulting from the litter spread across the picket situs is an appealing rationale. However, suppressing of an expressional exercise under the guise of prohibiting conduct susceptable to regulation will not wash. In *Schneider v. State*,[143] the Court had before it just such a regulation which purported to keep the streets clean and litter free by prohibiting the distribution of handbills. In striking down the regulation, the Court said "the purpose to keep streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from [engaging in expressional exercises]."[144]

Thus, it can be forcefully asserted that while reasonable regulations affecting the time, place, and manner of student picketing are permissible if the university bears the burden of demonstrating their necessary reasonableness,[145] nevertheless, a broad prohibition or overly restrictive university regulation in this regard is constitutionally defective.

University rules which are a legitimate exercise of reasonable regulation are perforce aimed at the necessity for order to enable it to get on with its lawful business and to enable others to take advantage of whatever the university provides. What would appear the apparent target of such a university regulation is the activity's "action" *vis-a-vis* its "expression."[146] Using these classifications, the university can successfully assert that regulation and suppression are not the same.[147] Within this theoreical framework, those forms of conduct classified as expression are entitled to complete protection against university infringement. The example of the student editor discussed above should logically be placed in the expression category, and therefore, the complete immunity asserted should apply. However, note the clear distinction to be found in *Hammond*. There the group expression was transformed into action in the nature of a demonstration. No longer could *complete* immunity under first amendment principles be unalterably applied in *Hammond*. It was not a question ultimately of freedom of speech or assembly, but rather a question of facts and proof of conduct withdrawing first amendment protection. When the conduct in *Hammond* moved from the harmless expression category to a form of action, the cloak of reasonable regulation fell over it. Because first amendment rights are involved in both instances, it does not follow that one and

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143 308 U.S. 147 (1939).

144 *Id.* at 162.

145 *See*, Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968), which held that a college rule, requiring that for mass demonstrations advance notice be given, was reasonable in light of the administration's need to prepare for any exigency.

146 *See generally*, Emerson, Freedom of Association and Freedom of Expression, 74 YALE L.J. 1, *esp.* 21 *et seq.* (1964); *see also*, T. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

147 Poulos v. New Hampshire, 345 U.S. 395, 408 (1952).

not the other may not be regulated. The Supreme Court has consistently found reasonable non-discriminatory regulations that bear a definitive nexus to peace and order and design to achieve a legitimate social objective are not offensive to first amendment principles.[148]

How, If at All, Is Off-Campus Activity Susceptable to Regulation?

The above discussion, while limited to on-campus activities, raises the necessity for examining the university's role, if any, when the same or similar activities are engaged in by students off the campus. If the activity is one which is constitutionally protected when engaged in by non-student citizens and is therefore protected against university infringement when engaged in by students on the campus, it follows that the sanctioning power is likewise removed from the university when the student chooses to engage in the same exercise off the campus. It would be clearly inconsistent, if not absurd, to permit a university to sanction a student for engaging in, for example, a peaceful demonstration downtown and be restrained from the same sanctioning process if the demonstration had been aimed at the university administration. The "chilling" effect of *Dombrowski* would be no less present if a student were forced to forgo political expression or lawful action off-campus upon pain of jeopardizing his status as a student. The doctrine of unconstitutional conditions once again would become operative in finding as unacceptable the premise that a student's status is conditioned upon his absention from lawful means of protected advocacy and expression.

The logical thrust of this negative implication is that it leaves the public university free to proceed against a student for any conduct not under the shield of constitutional protection that otherwise is subject to general restrictions by a valid state law. A university rule which threatens to sanction a student who violates a valid law does not appear to state a condition which operates to infringe upon any constitutionally protected right. Such a rule would not seem to come within the ambit of the unconstitutional conditions doctrine as it was employed above. For example, one has no constitutional right to be drunk and disorderly in a public place. Thus a person in that circumstance cannot successfully claim that any constitutional immunity is jeopardized by the law which makes such conduct a crime. Similarly, a university rule which operates to sanction a student who drives drunkenly cannot be said to interfere with a substantive constitutional right. Viewed in this context, the university rule rings akin to the familiar

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148 *E.g.*, Adderley v. Florida, *supra* note 118; Cox v. Louisiana, note 118; Edwards v. South Carolina, *supra* note 118; Staub v. City of Baxley, 355 U.S. 313 (1958); Poulos v. New Hampshire, *supra* note 147, Breard v. Alexandria, 341 U.S. 622 (1951); Feiner v. New York, 340 U.S. 315 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941); Lovell v. Griffin, *supra* note 138.

constitutional rubric that "one may not have a constitutional right to go to Bagdad."[149]

Application of the unconstitutional conditions doctrine to this circumstance could not be logically asserted. If one accepts the premise that initial attendance at a state university is not *per se* a constitutionally underscored right, and that the prerogative to drive drunkenly is likewise not a protected right, then conditioning the first upon abstaining from the other consequently is not objectionable in terms of the unconstitutional conditions doctrine as discussed earlier. Thus, the doctrine of unconstitutional conditions does not *per se* restrain a public university from promulgating a regulation that any student who violates a valid state, federal, or local law shall be sanctioned.

Just such a university rule was tested and found not objectionable in *Due v. Florida A. & M. University*.[150] In this case, the student was adjudged in contempt of court and was subsequently dismissed from the university on the authority of a regulation which in pertinent part read:

> Disciplinary action will be taken against students for: . . . . Misconduct while on or off the campus. This includes students who may be convicted by . . . city, county or federal [authorities] for violation of any of the criminal and/or civil laws.[151]

Counsel and the court in *Due* placed emphasis on the operative facts of the case as they related to the plaintiff's claim of lack of procedural due process. However, implicit in the court's opinion is the theory that since no constitutionally protected substantive interest of the plaintiff could be found through his engaging in contemptuous conduct, the university's classification of that activity as miscondut should not be examined.[152]

The objectionable "chilling" effect found in *Dombrowski* is likewise absent from the effect of a regulation operating against a student for violations of law. The potential pain of university sanction heaped atop the statutory punishment for law violations would seem to have only a beneficial "chilling" effect. It should serve as an added deterrent to obtain observance of legal requirements or proscriptions since the regulation chills only unprotected and unlawful activity.

The dilemma which would severely test the university rule threatening potential action against a student when a law has been violated arises where the violation itself contains a colorable claim of constitutional protection.

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[149] Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). Of course, the necessary prerequisite of the operative rule would require that the second phrase of that same rubric be observed; "but the government may not prohibit one from going there unless by means consonant with due process of law."

[150] 233 F. Supp. 396 (N.D. Fla. 1963).

[151] *Id.* at 399.

[152] Note: The writer has specifically discussed the *Due* case with the judge who heard it, The Honorable Harold Carswell, and was assured that had the case involved a federally protected interest, a totally different result might have emerged.

For instance, it would not be unlikely to find students engaging in enjoined activity which otherwise would be a protected mode of first amendment exercise—for example, enjoined civil rights marching. The question must necessarily arise: which takes precedence, the exercise of what would normally be a protected right, or the observance of the prohibition relating thereto? It we apply the reasoning just discussed, it should be more logical to assert that a valid legal proscription, the injunction, was violated therefore the doctrines of *Dombrowski* or unconstitutional conditions do not arise. On the other hand, if the constitutionally protected exercise is accepted as a preferred value, or if the basis of the injunction is subsequently found constitutionally unacceptable, then the university would appear powerless to invoke its sanctioning process in this circumstance.

By analogy to the rationale of *Walker v. City of Birmingham*,[153] the former rather than the latter view would seem to be the present constitutional approach. In *Walker*, an undenied first amendment exercise was temporarily enjoined pending further litigation to test a statutory restriction thereon as to its constitutionality. In violating the injunction, petitioners affronted the court and found themselves in contempt thereof. In asserting the invalidity of the ordinance which served as the basis for the injunction's issuance, the petitioners claimed that affirmance of their contempt conviction would be tantamount to an impermissible infringement on their first amendment rights. In affirming the convictions, the Court said that notwithstanding the potential viability of the constitutional claims, one who deliberately violates a court order may properly be convicted of contempt.

Tranposed to the student/university setting, an analogous situation should allow the university to exercise its sanctioning process in a like manner. Even though a student may be engaging in an otherwise protected activity, except for an extant injunction, the unconstitutional conditions doctrine or the "chilling" rationale of *Dombrowski* might apply. The university should nonetheless be able to assert the rule that conviction under a valid law should grant it the power to impose sanctions. This is reasonable because it is not the protected exercise that is subject to punishment, but the disregard of a court order having the force, temporarily at least, of law.

Granting that neither the unconstitutional conditions nor *Dombrowski* theories *per se* prevent the university from invoking its sanctioning process for law violations, there remains in legal contemplation the limitation on arbitrary actions under the idea of substantive due process. In the context of this paper, the arbitrary limitation concept should be thought of as a functional classification viewing the comparative arbitrariness of a given sanctioning rule.

Thus examined, the rule under scrutiny will not be found to have any

[153] 388 U.S. 307 (1967).

rational connection to a legitimate university purpose and therefore effecting a denial of substantive due process in the sense of being absolutely arbitrary. Rather, the rule, if found to deny substantive due process, must be so because its effects are harsh and inessential to achieve a legitimate purpose. In determining whether or not the application of a university rule seeking to punish off-campus law violations runs afoul of that doctrine, one should ask the following question: How substantial is the nexus between the rule in question and the legitimate purpose it is meant to serve?

The *Danskin* case cited earlier in another context serves well to illustrate this theory also. It will be recalled that the school district had as its purpose in requiring users of its facilities to sign a broadly stated loyalty oath the prevention of subversive or seditious conduct arising therefrom. *Inter alia*, the court viewed such a requirement as violative of substantive due process because the state had sought to achieve a legitimate end, the prevention of subversive conduct, by a means which was inessential thereto and comparatively harsh in its application. There were clearly other and more effective alternatives which the state could adopt to achieve the stated objective. For example, the state could adopt specific criminal statutes to prevent the feared subversive activity. The regulation was not void because it had absolutely no rational connection with the desired end, but because that nexus was too tenuous and too harsh when applied.

It is within this expanded idea of substantive due process that we should determine whether or not a university rule seeking to sanction a student for law violations can withstand assault. The omnibus rule found in *Due* purporting to empower the university to the disciplinary action against a student for violation of *any* law should, in the proper case, raise the spectre of constitutional infringement. For instance, the attempt to invoke such a rule against a student who is a notorious jaywalker or one who is convicted of fighting at a local football game would seem lacking in justification. The nexus between the university's purpose and the act engaged in by the student seems too specious to support sanction. However, the asserted rationale for the attempt to impose the sanction would probably follow the questionable theory that the university owes to the community at large a duty to act for the benefit of the general welfare. This belief may be held either because the community helps to finance the school, whether public or private, or because the university is dedicated to the purpose of acting as a public servant. Accordingly, as we have seen in *Due*, the university feels obliged to impose disciplinary sanctions where the student has engaged in off-campus conduct violative of the community's mores.

The errors in this rationale are two-fold. First, if the university owes a duty to the community, the nature of that duty is for the school to function as a university, not as a police court. Therefore, in order to justify its

disciplinary action on the grounds that it is fulfilling an institutional duty to the community, the university should be required to demonstrate that its attempted exercise constitutes conduct necessary to the educational process.

Second, the power to invoke punishment in our society resides exclusively with the state. For the university to thrust itself into the role of the state is to subvert, not aid, the public welfare.

In the overview then, it is fair to assert that the relative injury to the student's interest in retaining his association with the university would seem to clearly outweigh any injury claimed by the university itself. In this regard it cannot be disputed that disciplinary action taken by a university against a student carries with it the great possibility of subsequent consequences far in excess of the actual gravamen of the violation. A professional or graduate school will look with great apprehension at an applicant whose record reflects a disciplinary action based on a violation of law which itself may not even be a matter of record. Moreover, the federal government and the armed forces are loath to grant to a person with previous disciplinary trouble any type of meaningful security clearance or access to a sensitive job position.[154] The possible resultant economic deprivations or denial of economic opportunity caused by the university sanctioning process should be clear enough to require that the university prove its vital interests in any given case.[155] Moreover, in proving its interest, the university rule must be shown to be "necessary and not merely rationally related to the accomplishment of a permissible [university] interest."[156] The convenience of such a rule as found in *Due* should not be seriously contended as a counter-weight to the substantial interest of the student in his future economic potential and life-time earning power *vis-a-vis* his non-graduated contemporary.[157] The exercise of power by a university under these circumstances appears to clearly meet the *Danskin* rationale of harshness and inessentiality, since such action carries with it an indelible stigma which cannot but have serious consequences on the student.

By weighing the relative interests of a rule such as found in *Due* along with the interests of the university as contrasted against the student's interest in the posed circumstance, it is clear that the rule should be viewed as a clumsy and oblique device having little relation to the university's purpose. The jaywalking or fighting student is subject to the applicable state or local law which envisions its violation and establishes the punishment

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154 *E.g.*, Defense Dept. form 398 which is a multi-page government form every applicant for a security clearance must complete has a space provided for just such university disciplinary actions.

155 *See generally*, Reich, *The New Property*, 73 YALE L.J. 733 (1964).

156 McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

157 According to one study the difference in life-time earning capacity may be as great as $125,000. 1965 Statistical Abstract of the U.S., p. 122. *See also*, Brown v. Board of Education, 347 U.S. 483, 493 (1954), where the Court observed that it is doubtful whether one "may reasonably expect to succeed in life if he is denied [an] education."

therefor. The university can show a vital interest in these events sufficient enough to allow disciplinary action only by the most obtuse and tortured logic. Therefore, it is submitted that an attempted application of the *Due* rationale in most instances should be found constitutionally defective because it is comparatively so arbitrary that it can be viewed as a denial of substantive due process. Thus, the student should be considered as possessed of the personal freedom necessary for his self-education. In this way, the institution would be able to concentrate its limited resources on its central tasks. The ordinary police and judicial processes of the community would be sufficient to protect society against the misdeeds of students just as it does in the case of non-students.

The case of the female student given above is demonstrative of the limbo extant within the theories thus far discussed. Presumably the magazine for which she posed is not considered by the authorities to be obscene.[158] The sole basis for the attempted imposition of punishment by the university is that the student has engaged in "conduct unbecoming a lady." Thus is raised the question: Can the university impose sanctions for this type of non-academic and off-campus activity which violates no law?

Assuming briefly that the student's activity is not within the scope of protected exercises, such a regulation imposed by the university restricting non-academic and off-campus behavior must be aimed at conduct identified by society as well as the university community as contrary to public welfare. When such behavior occurs, the university may feel the need to express disapprobation because of the assumed destructive nature of such acts on the internal decorum and morals of the campus. Such an assumption is not unusual;[159] the inclusion of morality among the proper concerns of the state is firmly rooted in our history. If the conduct of the female student in this situation can be accepted as contrary to the public welfare, then any countervailing university interest, however slight, should be sufficient to render reasonable the regulation of her behavior through threat of sanctions.

However, defining the normative amiguity out of the term "public welfare" is a monumental if not insurmountable task and therefore some other criteria should be established by which the university's policy can be measured. In this analysis, it would seem valid to determine the potential detrimental effect on the wider public goal of freedom of lawful action as contrasted with the reasonableness of the regulation in obtaining the stated limited goal.

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[158] Obscenity such as the type briefly engaged in by the so-called Free Speech Movement at Berkeley presents a different question. A fair paraphrase of the *Roth* test would be to say that "obscene words used for their own sake to shock the viewer are not speech and are not protected by the first amendment." If the expression is outside of the scope of protection of the first amendment then there would seem to be no legal doctrine to justify restraining the university from sanctioning a student engaged in such "shock obscenity." See, L. Feuer, *Pornopolitics and the University*, The New Leader 14, April 12, 1965.

[159] *See e.g.*, Poe v. Ullman, 367 U.S. 497, 545-47 (1961) (Harlan, J. *dissenting*).

A university classifying as immoral that which is not otherwise illegal, appears to this writer to be an exercise in illegitimate paternalism which tends to induce immaturity, conformity, and disinterest. The inducement of these traits in university students occurs at the precise time when imagination, critical talent, and growth should be encouraged and given the opportunity for development. The insistence upon the power to discipline students for non-academic and off-campus activity, felt by the university to damage its reputation with the local community or alumni, lacks the reasonable or even a tenuous nexus to the intellectual and social discipline acknowledged to be necessary to maintain classroom order. Dean Hutchins addressed this unsatisfactory theory of university regulation by saying ". . . The university gets involved in trying to chaperone its students and soon finds that it's spending money and, what's more important, diverting its attention from the job [of education]."[160]

Viewed in the context of the relative values and objectives sought by the university and its students, a regulation seeking to impose sanctions on non-academic and off-campus activity is actually an impediment to the major function of the institution. It is within the light of the function of a university that the relationship between the institution and its students must be considered. The primary function of the university should be to transmit to the student the civilization of the past, to enable him to take part in the civilization of the present, and to make the civilization of the future.[161] It is because of this great pursuit that the student must be viewed as an individual who is most likely to attain maturity if left free to exercise the rights as well as shouldering the responsibility of citizenship on and off the campus.

But in the more traditional sense, who can say that a non-obscene picture in a magazine is any less a form of expression than Van Gogh's *Sunflowers*? The metaphysical nature of obscenity is beyond the scope of this paper, so suffice to say that a well articulated definition of obscenity is not yet part of our jurisprudence. Therefore, the use or the threatened use of sanction as a deterrent to female students in a circumstance such as raised above would seem a clear infringement on a protected exercise. It should not be logically asserted that the female model's mode of expression is any less constitutionally underscored than the female student who writes a letter to the editor of a local paper protesting a university policy.

This view gains additional credence from the recent case of *Pickering v. Board of Education*.[162] This analogous case was based on the dismissal

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[160] U.S. National Student Association, *In Loco Parentis*, pp. II-1, II-4 (Johnston 1962).

[161] R. Perry, *Realms of Value*, Harv. Univ. Press, 411 (1954); *See also, Joint Statement of Rights and Freedoms of Students*, 53 A.A.U.P. BULL. 365, 367 (1967).

[162] 391 U.S. 563 (1968); The same day a nearly identical case arising in Alaska was remanded for "further consideration in light of *Pickering*." *See*, Watts v. Seward School Board, 391 U.S. 592 (1968).

of a public school teacher for publication of a letter-to-the-editor which, according to the school board, was "detrimental to the efficient operation and administration of the schools of the district."[163] Pickering's claim of first amendment protection was rejected by the board on the theory that his acceptance of a teaching position obliged him to possess a degree of loyalty which would require him to refrain from criticizing the operation of the district schools. The school board recognized that this was a differentiation from the normal exercise of first amendment rights by non-teachers, but raised the school district's interest as a superimposed duty on the teacher.

One can envision the analogous situation in which a university seeks to sanction a student for a publication highly critical of the university administration or operation. One can paraphrase the school board's contention in *Pickering* thusly: the student by virtue of his relationship with the university has a duty of loyalty to his institution to protect its "good name" and to further its educational goals.

This posited standard fails in three respects. First, it overlooks the gravest danger of all which threatens a university's good name; that being, the affront to academic freedom generally so highly esteemed in policy declarations. By its attempt to exercise its power autocratically or in suppression of freedom of expression, the ideal of academic freedom becomes severely tarnished in the process. Second, the university has a sizeable arsenal with which to protect itself from any harm to its reputation which might be caused by the words of a student. It too has the same forums available to answer or refute the student's charges and it has the weight of institutional influence on its side. Of course, the university like any other institution may protect itself or obtain relief from the purported harm through the usual channels for obtaining civil remedies. Third, whenever a group of faculty members or alumni cry out that the university's good name is being injured, another group of faculty members or alumni will frequently cry out with equal volume that this same action by the student is actually enhancing the school's reputation. In any event, where the criticism is of a public function or public business, the interest of the university in its private reputation is overborne by the larger public interest in dissemination of truth.[164]

Moreover, a university's reaction to a student's venture into the arena of public debate which takes the posed tack would sharply contrast with the basic concepts of free speech often enunciated by the Court.

> The maintenance of the opportunity for free political discussion to the end that government [and presumably a university] may be responsive to the will of the people [the students] . . . is a fundamental principle of our constitutional system.[165]

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163 *Id.*

164 Garrison v. Louisiana, 379 U.S. 64 *esp* at 72 (1964).

165 Stromberg v. California, 283 U.S. 359, 369 (1931).

The utterances of students regarding the university are protected even though erroneous or made out of hatred toward the university if the standards of *Garrison v. Louisina*[166] can, as they should, be said to apply.

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in Court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.[167]

Pickering makes clear the constitutionally defective nature of regulatory schemes imposed on teachers because of their status and relationship to a school board. Surely, less cannot be said of the student who has, as only one member of the student body, a more detached and short-term relationship with the university. Finally it should be realized that while students are not necessarily the best critics in matters of university administration, they are in close contact with the actual operation of the institution and therefore the public should not be deprived of their views.[168]

To deem permissible the sanctioning of students where the form or content of their off-campus, non-academic expressions violate school policy, is to deny the concept that liberty of expression occupies a preferred place in our scheme of values. The policy considerations which require that government abstain from interfering with expressional liberty is at least as applicable to universities.

The university can beyond doubt curtail or sanction publicly obscene conduct. But this power relates to the previous discussion under the *Due* rationale of imposing sanction only after a judicial finding of the fact of obscenity, since obscenity is *ipso facto non-protected*[169] and usually unlawful. Thus, a finding that a student has or is engaged in obscene conduct may merit university sanction, subject of course, to the showing under other relevant constitutional principles that its interest is sufficient to warrant its action.

In the problem of our female student one final question must be raised: Even though the rule proscribing "conduct unbecoming a lady" was known to her, could she have known that her lawful conduct in posing for a magazine photograph would subject her to university punishment? While it might not be necessary to codify and closely define university rules respecting academic honesty, it seems eminently reasonable to require rules, especially proscriptive rules, concerning non-academic and off-campus activities to be fully articulated and well defined. The rules pertaining to academic honesty, being such an integral part of the institutional makeup, can more easily be taken as extant and understood by students taking advantage of

166 379 U.S. 64 (1964).

167 *Id.* at 73.

168 *See*, Pickering v. Board of Education, 36 Ill.2d 568, 225 N.E.2d 1 (1967) (Schaefer, J. *dissenting*).

169 Roth v. United States, 354 U.S. 476 (1957).

the university's academic offerings. However, outside these purely academic rules, the requirements and proscriptions incumbent upon the student cannot, with sufficient certainty, be said to be known by students. This problem has not gone unnoticed as a very real dilemma facing students. The American Civil Liberties Union has recognized this problem and has offered a resolution which in pertinent part reads:

> Regulations governing the behavior of students should be fully and clearly formulated, published and made available to the whole academic community. They should be reasonable and realistic. Overelaborate rules that seek to govern student conduct in every detail tend either to be respected in the breach, or to hinder the development of mature attitudes. . . . [S]pecific definitions are preferable to such general criteria as 'conduct unbecoming to a student' or 'against the best interests of the institution,' which allow for a wide latitude of interpretation.[170]

The vague declaration about unladylike conduct not only fails in a desirable policy sense to give the student adequate notice of the potentially sanctionable nature of her being photographed, but it falls short of the constitutional requirement that regulations penal in nature clearly delineate the outer limits of permissible conduct. To paraphrase Professor Freund, it should be improper, in light of today's constitutional jurisprudence regarding expressional freedoms, to permit a university regulation admittedly vague at the time of the student's action to be cured by a subsequent construction defining the act as immoral or unladylike.[171]

By asserting that the university's regulation is too imprecise to provide adequate warning that her actions were potentially subject to sanction, the student should not be viewed as engaging a useful defensive ploy to escape punishment. The unacceptable nature of vague proscriptive regulations has long been intimately associated with the substance of individual freedom. This is especially true in first amendment cases where the standard of definiteness for regulations curtailing free expression is stricter than it is for other types of restrictions. This more rigid standard was restated and emphasized in *Keyishian v. Board of Regents*,[172] where the Court made patently clear that ". . . [B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity . . . [thus making the] standards of permissible . . . vagueness strict in the area of expression."[173]

The vague terms condemned by the ACLU resolution, cited above,[174] and forming the basis of the university's purported action, would seem to

[170] American Civil Liberties Union, Academic Freedom and Civil Liberties of Students in Colleges and Universities (1961).

[171] P. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 540-541 (1951).

[172] 385 U.S. 589 (1967).

[173] *Id.* at 603 citing NAACP v. Button, 371 U.S. 415, 432, 438 (1963). *See also*, cases cited note 61 *supra*.

[174] *Supra* note 170.

doubtless fall within the penumbra of the first amendment vagueness doctrine. The proscription against "conduct unbecoming a lady" can only be viewed as wholly lacking in "terms susceptible of measurement . . . and having the quality of extraordinary ambiguity."[175]

Even assuming, *arguendo*, that the student's conduct in posing for the photograph *does not* come within the classification of protected expression, the proscription should nonetheless be viewed as impermissible within the vagueness doctrine.[176] Thus considered, the regulation becomes one aimed at conduct which is not constitutionally protected and, perhaps, not even socially desirable. Irrespective of the classification into which the activity is thus placed, the regulation, while not vague on its face and therefore not void on its face, becomes subject to the vagueness doctrine in light of the manner in which it is applied. "Men, [and supposedly students] of common intelligence [still] must necessarily guess at its meaning."[177]

Permissible University Abridgment of Otherwise Protected First Amendment Exercises

Finally and briefly, we should consider the possibility that there may exist times and circumstances which would operate to limit or even suspend the constitutionally underscored rights of students discussed above. While there is no case law or other authority on this point, perhaps a viable analogy can be made to the recent turmoil we have experienced in American cities.

American universities in recent years have experienced student-inspired and student-led disruptions and upheavals not unlike those occurring in our cities. What then is the power of the university in these disturbances *vis-a-vis* the students' rights of expression and action?[178] Throughout this thesis it has been granted that the university may, in certain instances, impose reasonable regulations comporting with its academic purposes as to the time, place, and manner of student engagement in constitutionally protected activity. Given this grant, it is not illogical to assume that in a situation of riot or other great disturbance on the campus, the university may possess the powers similar to a mayor or governor in declaring a "state of

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175 Cramp v. Board of Public Instruction, 368 U.S. 278, 286 (1961).

176 Baggett v. Bullitt, *supra* note 26; *see also*, Hicks v. District of Columbia, 383 U.S. 252 (1965), *dismission cert. granted* 379 U.S. 998 (1964) as improvidently granted (Douglas, J. *dissenting*), "If a penal statute is so imprecise [i.e.: vagrancy] as to deny fair warning to those who might transgress it, any conduct . . . under it which might have been proscribed by a more precisely worded statute is irrelevant," at 253; United States v. National Dairy, 372 U.S. 29 (1963) (Black, J. *dissenting*); *Contra*, Dominguez v. City of Denver, 363 P.2d 661 (Colo. 1961).

177 *Id.*

178 In discussion the posed contingency reference is made only to those campus activities such as student organizations, student publications, on-campus residence halls, etc. which are not otherwise controlled or regulated by state or local laws. Nor does this discussion refer to police matters since it is presumed that whatever law enforcement agency is or may be callled in is under the control of someone or some agency other than the university.

campus emergency." Within a community the declaration of a state of emergency by the chief administrative official generally allows for the imposition of certain restrictions on normally legal activities.[179] Thus considered, it would be a wise legislative action to recognize the campus as a potential place of disturbance and specifically delegate and authorize the proper university officials to act to protect university property and to achieve a return to normalcy as quickly as possible. Likewise, it would be a wise university administration that sought to promulgate a particular set of regulations to become operative upon the happening of the contingency.

By allowing the university to recognize and declare a state of campus emergency similar to that recognized within other communities, civil disorder situations within the campus borders could be dealt with fairly and quickly. Hopefully, the judicious use of these powers would permit the university to avoid the inflamatory publicity and undesirable political ramifications as well as the closing off of non-violent options that so frequently attend a civil disorder.

In weighing the student activities of meetings, assemblies, demonstrations, and the like against the supposed precarious situation, it is not unlikely that the constitutionally established clear and present danger test applied to campus activities through *Hammond* might well be met. In such an instance, the normally applied devices of curfew and restricted assembly, etc., do not seem too severe an infringement on otherwise protected activity.

The obvious advantage of recognizing this broad power within the university is that it allows for a flexible response, at the "local" level, to an emergency situation. The application of the power can be tailored to deal with the individual characteristics of the situation. Emergency regulations can be applied only to the degree necessary and only in the area of the campus involved in the disorder. Life on the remainder of the campus can be allowed to proceed as normally as possible. Through this option of swift and flexible action to a potentially turbulent situation, a level of control may be effected before the disorder becomes a destructive force.

This idea is not without its corollary disadvantages. In exercising these posed powers, the university must be certain that it is acting on a firm legal basis, because some of the regulations imposed, or even the power to impose them, may be tested in court. A judicial decision against the university's right to use these summary powers, or against some of the regulations promulgated in applying them, may cause a serious dislocation in the future institutional planning program regarding civil disorders. Invalidation of some acts done under summary powers in one incident may hinder effective application of other, perfectly permissible regulations in subsequent inci-

[179] *See e.g.*, Wisconsin Stat. 66.235 which allows for suspension of normally lawful activity in time of turmoil as declared by the city council arising *inter alia* from "riot or civil commotion." The city authorities are empowered "to order whatever is necessary or expedient."

dents because respect for the university's exercise of authority may be compromised by adverse court decisions.

Another potential disadvantage of the posed summary powers is that their invocation may limit the use of other less publicized or informal means to control the situation. The use of these powers may aggravate the already potentially serious status by telling both sides that the point has now been reached where violence from one side is expected and extraordinary measures will be used by the other to suppress it.

In the final analysis, it is difficult at best to attempt to subsume a university's nature within that category of characteristics nomally assigned to a city. The function of the university does not lend itself to provision for massive law enforcement or control of civil disorders. This is, and rightly so I think, normally thought of as a task of the state agencies who usually are concerned with such matters. However, it is not illogical to propose that in those areas of student activity common only to the campus, the university should be able to exercise a degree of emergency control differing only in nature from a city.[180]

CONCLUSION

If the foregoing has any persuasive value at all, it should be to lay at rest any remnant of the once dominant idea that universities, like medieval corporations, are entities outside of the ordinary law. While it is undisputed that the nature of a university campus, with its tightly packed and constantly interacting population, makes necessary some degree of institutional rule-making authority, observation should show that such rule-making authority differs only in degree and kind peculiar to the nature of the university community *vis-a-vis* the "typical" community. The traditional view that the university, for one reason or another, may or must act to control the student in his everyday life affairs, his published expressions, the organizations he forms and joins, the views he expresses in public places, or causes to be expressed by the speakers he invites, and his propensities for general law violation must expire under examination. It is hard to reconcile the prevalence of the vivid fears inherent in the traditional view with the primary functions of the university in preparing tomorrow's citizens for their role in community life through the transmission and increase of knowledge. It is even more difficult to reconcile acceptance of all-pervasive university regulation of students as a way of life on the campus with the recognition that no other community or institutional body may so act in relation to the rest of the populace and remain consonant with constitutional mandates.

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[180] *See generally, Suppression of Civil Disorder in Pre-Riot, Trans-Riot, and Civil Disturbance Situations,* National League of Cities, Nov. 10, 1967; *Report of the National Advisory Commission on Civil Disorders,* N.Y. Times ed. 1968 *esp.* at 522-528.